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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

LEWIS P. HOPKINS, JR.

vs.

DIANA McGINTY HOPKINS

On Appeal from the Supreme Court of the State of Louisiana

JURISDICTIONAL STATEMENT

DAN A. SPENCER
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LECOMTE, SHREVEPORT, LOUISIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. _____

LEWIS P. HOPKINS, JR.

vs.

DIANA McGINTY HOPKINS

On Appeal from the Supreme Court of the State of Louisiana

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana refusing the writ of certiorari petitioned by appellant and affirming the opinion of the District Court is not yet reported. The opinion of the Louisiana Supreme Court is set forth in Appendix A, infra. The response filed by the District Judge to appellant's petition for writ of certiorari in the Supreme Court of Louisiana is set forth in Appendix B., infra. The opinion of the United States

District Court is reported in *Spencer v. Dixon*, 290 Fed. Supplement 531 and is not contained herein as it does not form a part of the instant proceedings.

JURISDICTION

The instant proceeding began as a suit for separation from bed and board filed pursuant to Louisiana Code of Civil Proceedure as more fully appears herein below. Appellant, attorney for the petitioner therein was ordered to show cause why he should not be held in contempt of a judge in the court in which the proceeding was pending. It was alleged by appellant in the contempt proceeding that Louisiana Code of Civil Proceedure, Article 222 was invalid as repugnant to the Constitution of the United States. Both the District Court and Supreme Court decided the question in favor of the validity of the statute. Appellant was adjudged guilty of contempt of Court and sentenced to twenty-four hours imprisonment and a $100.00 fine.

Notice of appeal was filed by appellant in the Supreme Court of Louisiana on July 15, 1969. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred on this Court by 28 U. S. Code, Sections 1257 (2) and 2101 (c). That such jurisdiction exists is the circumstances of this is sustained by the following decisions: *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2nd 686; *Woods v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364 8 L.Ed. 2nd. 569; *Garrison*

v. State of Louisiana, 379 U.S. 64th, 85 S.Ct. 209, 13 L. Ed. 2nd. 125; *Holt v. Commonwealth of Virginia*, 381 U.S. 31, 85 S.Ct. 1375, 14 L.Ed. 2nd. 290.

STATUTE INVOLVED

Article 222 (3) of the Louisiana Code of Civil Proceedure defines the following as contemptous conduct on the part of an attorney:

> "Use of insulting, abusive, or discourteous language by an attorney or other person in open court, or in a pleading, brief, or other document filed with the court in irrelevant criticism of another attorney or of a judge or officer of the court."

It is this provision under which appellant was adjudged guilty of contempt of court.

QUESTIONS PRESENTED

(1) Whether Louisiana Code of Civil Proceedure, Article 222 and particularly Subsection 3 thereof is invalid as in violation of the Fourteenth Amendment to the Constitution of the United States, and through it, the First Amendment to the Constitution of the United States, upon the grounds that it denies the appellant freedom of speech and further that it denies to appellant due process of law.

(2) Whether there was any evidence that appellant had violated the provisions of Article 222 of the Louisiana Code of Civil Proceedure.

STATEMENT

Appellant, DAN A. SPENCER, an attorney at law, practicing in the City of Shreveport, Louisiana represented Lewis P. Hopkins, Jr. in a suit for separation from bed and board against Mr. Hopkins' wife. Mr. Hopkins and his only witness in the said suit were engaged in circulating a petition to have John A. Dixon, Jr., Judge of the First Judicial District Court removed from office pursuant to the provisions of the Louisiana Constitution, Article 7, Sections 2 and 10. The divorce suit was of judicial necessity filed in the First Judicial District Court and was assigned according to the rules of said court to Judge Dixon, one of the five judges. The suit for separation from bed and board was not contested. Mrs. Hopkins appeared in person at the hearing for confirmation of the default in the case. Despite uncontested evidence and proof of the grounds for separation, Judge Dixon dismissed the suit. A motion for rehearing was filed limited to reargument of the case. Immediately thereafter, the appellant, on behalf of Mr. Hopkins, flied a Motion to Recuse Judge Dixon from further consideration of the case.

The Motion to Recuse contained the following paragraph:

> "The plaintiff herein, LEWIS P. HOPKINS, JR. and his chitf witness in this case, MR. CHARLES ANDERSON, III are presently engaged in the process of attempting to have JUDGE JOHN A. DIXON, JR. removed from office as being unfit therefor for virtue of corruption, favoritism, oppression, and misfeasance in office."

Judge Dixon took offense at this Motion and filed the following Rule to Show Cause against appellant:

> "In the above numbered and entitled cause, IT IS ORDERED that a rule issue herein directed to Dan A. Spencer, attorney for plaintiff, directing him to show cause on Friday, March 29, 1968, at 10:00 A.M. in the courtroom of Section "B", First Judicial District Court in and for Caddo Parish, Louisiana, why he should not be held in contempt of court for the following, to wit: That on March 21, 1968, Dan A. Spencer did file a pleading in the above numbered and entitled cause which contained scandalous, insulting, and abusive language in irrelevant criticism of the Judge of said Court, which pleading is attached hereto and made a part hereof, and which language, particularly in paragraph four thereof, impairs the dignity of the Court and the respect for its authority, contrary to the law of the State of Louisiana.
>
> This done and signed on this, the 26th day of March, 1968.
>
> s John A. Dixon, Jr.
> District Judge

A Motion to Recuse Judge Dixon was filed to the Show Cause Order. Neither of the motions to recuse were acted upon by Judge Dixon. Appellant then petitioned the United States District Court to enjoin Judge Dixon from proceeding further with the contempt rule. The United States District Court prohibited Judge Dixon from proceeding further with the contempt rule. This order was later amended to allow further proceedings should another judge be appointed to hear the contempt rule. Appellant's

allegations as to the unconstitutionality of the Louisiana Contempt Statute, Louisiana Code of Civil Proceedure, Article 222 were rejected by the United States District Court sitting as a three judge District Court.

Judge R. B. Williams, Judge of the 26th Judicial District Court was assigned by the Supreme Court of Louisiana, on motion of Judge Dixon, to hear the contempt rule against appellant. Appellant was adjudged guilty of contempt of court on June 10, 1969 and sentenced to twenty-four hours imprisonment and $100.00 fine, the maximum penalty under the Louisiana Code of Civil Proceedure. He was given until June 13 to apply to the Supreme Court of Louisiana for a Wrjt of Certiorari. On June 26, 1969 the Supreme Court of Louisiana refused the petitioned writ.

It is submitted that the provisions of the Louisiana Code of Civil Proceedure under which appellant was adjudged guilty of contempt are unconstitutional as repugant to the First and Fourteenth Amendment of the United States Constitution. It is further submitted that this result must be reached both as to the constitutionality of the statute on its face and as interpreted by the Supreme Court of Louisiana and applied to the appellant.

Appellant did nothing in the Motion to Recuse but allege a fact, ie., the fact that his client and a witness was in the process of attempting to have the District Judge removed from office for the reasons set out in the Louisiana Constitution for removal of a judge from office. The motion filed by appellant on behalf of his client is devoid

of any words offensive in or of themselves. The allegations of the motion were necessary and proper in order to obtain recusal of the district judge from the case. To paraphrase this Honorable Court in the case of *Holt v. Virginia*, supra:

> "The words used in the motion were plain English and in no way offensive in themselves and wholly appropriate to charge bias . . . of a presiding judge . . . and respondent could not, consistent with due process of law, be convicted for contempt for filing these motions unless it might be thought that there was something about the language used that would justify the conviction."

The Louisiana Supreme Court in a previous case involving Judge Dixon and appellant has held the truth is no defense to a charge of contempt of court against an attorney based upon criticism of a judge. In that case *Spence v. Dixon* 181 So. 2nd. 41 248 La. 604 the court stated:

> "In his opposition to the rule of contempt, Spencer admitted that he made the charges set out above. In justification of these charges he pleads as his sole defense the truth of the charges, but justification does not constitute a defense to a contempt of court such as we have here."

The court further held:

> "In support of this contention respondent relits on the Sixth and Fourteenth Amendments to the Constitution of the United States." (Spencer had relied upon Garrisin v. Louisiana, supra, and Holt v. Virginia, supra.)

"NEITHER THESE PROVISIONS OF THE FEDERAL CONSTITUTION NOR THE CITED CASES ARE APPLICABLE IN THE INSTANT CASE." (Emphasis Supplied).

The Court stated further that:

". . . the law gives to a person who has committed a direct contempt, for, as stated previously, under Article 223 of the Code of Civil Proceedure he could have been found guilty without any trial other than an opportunity to be heard orally by way of defense or mitigation."

The foregoing pronouncements of the Louisiana Supreme Court and its authoritative interpretations of the Louisiana Statute are patently inconsistent with the holding of this court in *New York Times v. Sullivan*, Supra; *Garrison v. State of Louisiana*, Supra, and *Wood v. State Georgia*, Supra. Tht appellant insisted throughout the proceeding in the court below that truth was a defense to the charges in question. The district judge in his memorandum filed with the Supreme Court of Louisiana, in response to appellant's petition for a Writ of Certiorari, specifically stated:

"Applicant in his petition, Page 5, Paragraph E, Section 5, assigns as error the trial judge not allowing a defense of truth to the contempt charges. Judge Williams refused to admit any such evidence. The basis of this ruling was the holding by the Supreme Court of Louisiana in the case of Gautreaux vs. Gautreaux, 220 La. 564, 57 So. (2) 188 (1952) which stated:"

"We know of no law or authority which recognizes justification as a defense for contempt of court. To the contrary, it was held in State ex rel. Stewart vs. Reid, 118 La. 827, 43 So. 455, 458, that evidence that the contemptuous language was justified is inadmissable, the court stating that: ''

'Respect for the Judicial office should always be observed and enforced.' ".

The second question presented by this appeal concerns the existence of any evidence of conduct by appellant which would meet constitutional definition of Contempt of Court. Appellant's description of the actions of others in the Motion to Recuse did not constitute allegations by him per se. They constituted rather a necessary factual allegation which was both relevant and material in the motion in which it was contained. Indeed a specific description of the basis of a judge's bias is required by the Louisiana Code of Civil Procedure in a Motion to Recuse. Louisiana Code of Civil Procedure, Article 154. *Schelag v. Dunlap* 130 La. 498, 58 So. 162, *State v. Hayes* 127 La. 762, 53 So. 983.

The action of the Supreme Court of Louisiana and of the District Court overruled the pre-existing law of that State to the effect that an attorney may not be judged guilty of contempt for stating the grounds of recusation in a motion to recuse. *State v. Simbo* 134 La. 73, 97 So. 302; *State v. Nucas*, 147 La. 594, 85 So. 52. It is submitted that appellant's conduct in filing the motion to recuse could not come within a constitutional interpretation of the Louisiana definition of contempt, contained in Louisiana Code of Civil Procedure, Article 222.

THE QUESTIONS ARE SUBSTANTIAL

The issue in this appeal is a fundamental constitutional right balanced against the practical necessity of the orderly administration of justice. It is the appellant's contention that the orderly administration of justice, while no doubt seriously impeded in the instant case, was damaged not by his conduct but by the irresponsibile and vindictive action of a district judge who was facing removal from office. The pronouncements of this court respecting the paramount importance of the constitutional guarantee of free speech are too legion to be quoted herein. The appellant, as an attorney, took a course of action called for by the highest standards of the American Bar, in the face of an admittedly vindictive judge. He was called upon, in the interest of his client, to take action which would certainly bring retributioon. That action, in the form of a motion to recuse, followed clearly defined Louisiana Proceedures for recusation of a judge. The filing of such a motion did not impair the administration of justice. If it had been referred to another judge for hearing, or if Judge Dixon had voluntarily recused himself, as he was clearly required to do, the administration of justice would not in any respect been impaired. Justice would rather have been served. The action of Judge Dixon, however, which was immediately brought to public attention, served only to magnify an already scandulous situation. The United States District Court, in recognition of this fact, enjoined Judge Dixon from hearing the contempt charge against appellant.

As this court noted in *Gitlow v. New York*, 268US 652:

> "For present purposes, we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States.
>
> The Fourteenth Amendment does not permit a state to make criminal a peaceful expression of unpopular view — 'A function of free speech under our system of Government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that lies far above public inconvenience, annoyance or unrest. . . There is no room under our Constitution for a more restrictive view.' "

Judges are not immune from constitutionally protected criticism. As this court stated in *New York times v. Sullivan*, Supra:

> "Authoritative interpretations of the First Amendment guarantees have constantly refused to recognize an exception for any test of truth — whether administered by judges, juries or administrative

officials — AND ESPECIALLY ONE THAT PUTS THE BURDEN OF PROVING TRUTH ON THE SPEAKER." 376 US at 271.

"Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. WHERE JUDICIAL OFFICERS ARE INVOLVED, THIS COURT HAS HELD THAT CONCERN FOR THE DIGNITY AND REPUTATION OF THE COURTS DOES NOT JUSTIFY THE PUNISHMENT AS CRIMINAL CONTEMPT OF CRITICISM OF THE JUDGE OR HIS DECISION."

Bridges v. California, 314 US 252, 86 LEd. 192, 62 S. Ct. 190, 159 ALR 1346.

This Honorable Court's decisions in *Garrison v. State of Louisiana*, Supra also clearly extended the protection of the First Amendment to the appellant. To paraphrase once again the opinion of this Court in *Holt v. Virginia*, Supra:

THE ISSUE OF TRUTH OR FALSITY OF THESE CHARGES WAS NOT HEARD, THE TRIAL COURT CHOOSING INSTEAD TO CONVICT AND SENTENCE PETITIONERS FOR HAVING DONE NOTHING MORE THAN MAKE THE CHARGES. Even if failure to prove their allegations of bias could under any circumstances ever be made part of the basis of the contempt charge against petitioners, these convictions cannot rest on any such unproven assumption.

The Supreme Court of Louisiana has most cavalierly treated that decision of this Court in *Spencer v. Dixon*, Supra and in the instant case.

It is, I believe, plain that this case presents a question of substantial constitutional importance, involving as it does the continued refusal of the Louisiana Courts to recognize and apply the Constitution of the United States as interpreted by this Court in the cited cases. Of equal importance is the necessity to establish the right of members of the Bar to take responsibile and necessary action on behalf of their clients in the face of judicial unpopularity. The precedent established by this case and that of *Spencer v. Dixon*, supra, can only have repressive effect on the Members of the Bar and their pursuit of an honest and impartial administration of justice. This perhaps, more than any other reason, requires consideration of this case by this Honorable Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of public importance and it is respectfully submitted that probable jurisdiction should be noted. Alternatively, in the event that this appeal shall have been rejected, appellant prays that these papers herein be treated as a petition for Writ of Certiorari in accordance with provisions of 28 U. S. Code, Section 2103.

DAN A. SPENCER
Attorney at Law
P. O. Box 4215
Centenary Station
Shreveport, Louisiana 71104
PRO SE

CERTIFICATE

I, DAN SPENCER, Attorney at Law, hereby certify that a copy of the foregoing Jurisdictional Statement was sent to the Honorable R. B. Williams, Judge, 2nd Circuit Court of Appeals, State of Louisiana, by depositing same in the United States mail, postage prepaid addressed to him at the 2nd Circuit Court of Appeals, Caddo Parish Court House, Shreveport, Louisiana.

.....

DAN A. SPENCER
Attorney at Law
P. O. Box 4215, Centenary Station
Shreveport, Louisiana 71104

APPENDIX A

SUPREME COURT OF LOUISIANA
New Orleans, 70112

June 26, 1969

LEWIS P. HOPKINS, JR.
v.
DIANA McGINTY HOPKINS
No. 49,925

In re: Dan A. Spencer applying for writ of certiorari

Writ refused.

There is no error of law in the ruling complained of.

s JWS.
s JBF
s JBH
s WBH
s MEB

McCALEB, J., is of the opinion that the application should be granted.

SUMMERS, J., is of the opinion the writ should be granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, June 26, 1969

s Harold A. Moise, Jr.
Deputy Clerk

APPENDIX B

No. 49925

SUPREME COURT

STATE OF LOUISIANA

In re: Application for Writ of Certiorari
by Dan A. Spencer

LEWIS P. HOPKINS, JR.

Versus

DIANA McGINTY HOPKINS

Number 182,404

First Judicial District Court
Caddo Parish, Louisiana

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA:

An application for Writ of Certiorari in the above matter has been made on the petition of Dan A. Spencer. In accord with the suggestion of the Honorable Justices of the Supreme Court of the State of Louisiana the presiding District Judge Richard B. Williams, files this answer:

The recitals of the application of Dan A. Spencer faithfully relate the chronological order of the events and filings, with only the following material exceptions, to-wit:

A. There is omitted therefrom that Judge Richard B. Williams, following the order appointing him to hear the contempt rule, did by letter addressed to the Clerk of Court, Caddo Parish, Louisiana, and of date April 22, 1968, request the Clerk to properly notify all parties at interest that the rule to show cause directed to Dan A. Spencer why he should not be held in contempt of court, would be heard on Tuesday, May 7th., 1968, at 10:00 A.M., in the First Judicial District Court, Caddo Parish Courthouse, Shreveport, Louisiana. On April 23, 1968, the Clerk notified Mr. Spencer and all other interested parties of the hearing date.

B. On April 24, 1968, the day following the receipt of the above notice, Mr. Spencer filed a motion in the United States District Court, Western District of Louisiana, in Civil Action Number 13,676, entitled Dan A. Spencer Versus John A. Dixon, Jr., and on the basis thereof the Honorable Ben C. Dawkins, Jr., Judge of the said United States District Court, granted a temporary restraining order, dated April 24, 1968, which stated in part:

> "and any and all other persons, whomsoever, by forbidding, preventing or interfering with the exercise of the rights of the defendants herein as set forth in the complaint filed in this cause."

A copy of this restraining order was served on Judge Williams at Natchitoches, Louisiana, on the 25th. day of April, 1968, by a federal marshal, and in obedience to said injunction no hearing was held on May 7, 1968.

C. On September 30th., 1968, the action before the United State District Court was dismissed in an opinion rendered by the Honorable Ben C. Dawkins, Jr. and an appeal therefrom was taken by Mr. Spencer to the United States Court of Appeal for the Fifth Circuit.

D. By order dated March 17, 1969, the Judges of the Fifth Circuit, United States Court of Appeals, dismissed this appeal on Appellant's motion to dismiss same.

E. A copy of the order of dismissal was not received by Judge Williams until May 1969.

F. On May 17, 1969, following receipt of a copy of the said order, Judge Williams wrote the Clerk of Court, Caddo Parish, Louisiana, and requested that the Clerk notify all parties at interest in the contempt proceedings that the rule to show cause would be heard on Tuesday, June 10, 1969, at 10:00 A.M. in an appropriate courtroom of the First Judicial District Court, in and for Caddo Parish, Louisiana.

On June 10, 1968, at 10:00 A.M. court convened in the Caddo Parish Courthouse, Shreveport, Louisiana, at which time Judge Williams presided. There was present Mr. Spencer, who then raised the issue as to the legality of his notice and the fixing of the time of the hearing.

Judge Williams overruled the objection by the defendant in rule, Mr. Spencer, and gave as his reasons that the postponing of the hearing on May 7, 1968, was brought about by the injunction obtained by Mr. Spencer in the United States District Court and his subsequent appeal to the Fifth Circuit, United States Court of Appeals, and which appeal was finally dismissed on Mr. Spencer's own motion.

The oral notice to Mr. Spencer of the time and place of the hearing on June 10, 1968, was legal and sufficient and his appearance at the hearing so attests.

Judge Williams decided the issues raised in Applicant Spencer's petition as follows:

Issue No. 1 — overruled the objections for the reasons above given.

Issue No. 2 — An order of the Louisiana Supreme Court was issued on April 11, 1968, appointing Judge Williams to hear the contempt rule issued against Mr. Spencer. The Judge acting under said order overruled the objections of Mr. Spencer to the Judge's authority to act.

Issue No. 3 — there appears to be an error in the quotation of paragraph 4 of the motion to recuse the District Judge as set forth in applicant's "Argument on Assignment of Errors No. 3." In the last three lines of quoted paragraph 4 as shown on page 8 of the application are the words:

> "removed from office as being unfit therefor for virtue of corruption, bias, prejudice and misfeasance in office".

The actual words as shown on the attached motion are:

> "removed from office as being unfit therefor by virtue of corruption, favoritism, oppression and misfeasance in office."

Judge Williams held that the pleadings prepared and signed by Dan A. Spencer containing the above language and that of paragraph 8 of the original motion were defamatory of the Judge of the District Court and was in contempt of the court. After finding Mr. Spencer in contempt Judge Williams asked him did he wish to make any statement in order to purge himself of contempt. Mr. Spencer stated he had nothing to say. Sentence was then pronounced.

Issues 4 and 5 were overruled as the Court held that Dan A. Spencer, was an Attorney-at-Law and as such was an officer of the Court and had an obligation to properly respect the Judge when so acting.

Applicant in his petition, page 5, paragraph E, section 5, assigns as error the trial court not allowing a defense of truth to the contempt charges. Judge Williams refused to admit any such evidence. The basis of this ruling was the holding by the Supreme Court of Louisiana in the case of Gautreaux vs. Gautreaux, 220 La. 564, 57 So. (2) 188 (1952) which stated:

> "We know of no law or authority which recognizes justification as a defense for contempt of court. To the contrary, it was held in State ex rel. Stewart vs. Reid, 118 La. 827, 43 So. 455, 458, that evidence that the contemptuous language was justified is inadmissible, the Court stating that:
>
> > 'Respect for the Judicial office should always be observed and enforced.' ".

This matter is herewith submitted to the Honorable Justices of the Supreme Court of Louisiana, with leave requested that the above be deemed sufficient reply or answer by the undersigned Judge.

Respectfully Submitted

s RICHARD B. WILLIAMS

RICHARD B. WILLIAMS
Judge-ad-hoc

Copy mailed to:

Mr. Dan A. Spencer
Attorney at La
[illegible]

SUPREME COURT, U. S.

JAN 2 1970

JOHN F. DAVIS, CLERK

Number 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter

of

DAN A. SPENCER

On Appeal from the First Judicial
District Court, Caddo Parish, Louisiana

RESPONSE OF TRIAL JUDGE; MOTION TO DISMISS OR ALTERNATIVELY AFFIRM

JACK P. F. GREMILLION
Attorney General of the
State of Louisiana,

Attorney for the Honorable
R. B. Williams, Judge,
Respondent

MID-SOUTH PRESS, INC. - SHREVEPORT, LOUISIANA

Number 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter
of
DAN A. SPENCER.

RESPONSE OF TRIAL JUDGE; MOTION TO DISMISS OR ALTERNATIVELY AFFIRM

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Now into court, through counsel, comes respondent, R. B. Williams, Judge of the Tenth Judicial District Court of the State of Louisiana (on hearing below, ex-officio Judge of the First Judicial District Court of the State of Louisiana), who moves:

I.

The appeal of Dan A. Spencer should be dismissed for the following reasons:

A. Appellant has failed to docket the proper record of this case below before this Honorable Court as required by Rule 13 of the Rules of the Supreme Court of the United States.

B. The record filed by appellant consists of only an application for writ of certiorari, with supporting documents, filed by appellant to the Supreme Court of the State of Louisiana; the documents supporting this application did not include the record of the trial court; the Supreme Court of the State of Louisiana denied appellant's application for writs and therefore had no occasion to order the record from the trial court.

C. This trial court record, being the "record" contemplated by Rule 12 of this Honorable Court, is lodged and has remained with the First Judicial District Court for Caddo Parish, Louisiana; this record has not been filed by appellant.

D. In order for this Honorable Court to adjudicate the issue of probable jurisdiction or any other issue, appellant should have afforded this Court the opportunity to examine the entire record.

II

Alternatively, appellee shows that this Court ought to be summarily affirmed under Rule 16 of this Honorable Court for the following reasons:

A. Appellant's response to the contempt rule filed by appellant on hearing of the contempt rule in the First Judicial District Court for Caddo Parish, Louisiana, raised no substantial constitutional question.

B. Appellant's notice of appeal filed before this Court and appellant's jurisdictional statement raise no substantial questions concerning the interpretation of the Constitution of the United States warranting the assumption of jurisdiction by this Honorable Court.

C. After appellant was cited for contempt by a judge for the First Judicial District Court for Caddo Parish, Louisiana, appellant instituted injunctive proceedings entitled "Jerome A. Brown et al v. Jerome the United States District Court for the Western District of Louisiana, in which proceedings appellant raised the issues now sought to be adjudicated by this Honorable Court.

D. A three judge court was convened at appellant's request. The three judge court concluded that appellant raised no substantial constitutional questions, and dismissed itself.

E. Thereafter, the United States District Court granted defendant summary judgment and dismissed appellant's actions. That court passed on all issues now raised by appellant in his jurisdictional statement. The opinion is reported at [illegible] Federal Supplement, [illegible] Appeals.

F. Appellant failed to timely file notice of appeal from that proceeding to the Fifth Circuit Court of Appeals. Subsequently, appellant voluntarily moved to dismiss his

appeal; he acquiesced thereby in the judgment of the United States District Court for the Western District of Louisiana, which decided adversely to him all issues now urged to this Court.

WHEREFORE, appellee prays that this appeal be dismissed or, alternatively, affirmed without further proceedings.

Signed: JACK P. F. GREMILLION

JACK P. F. GREMILLION,
Attorney General of the
State of Louisiana

Of Counsel for
Honorable R. B. Williams,
Judge of the
Tenth Judicial District Court
of the State of Louisiana,
Appellee

CERTIFICATE OF SERVICE

I, Jack P. F. Gremillion, a member of the Bar of the Supreme Court of the United States, attorney for the Honorable Richard B. Williams, respondent, certify that copies of the foregoing motion have been served on Mr. Dan A. Sportsman, appellant, by mail addressed to him at Post Office Box 1251, Louisiana State University Station, Baton Rouge, Louisiana 70803, postage prepaid this [illegible] day of December, 1969.

Signed: Jack P. F. Gremillion

Jack P. F. Gremillion
Of Counsel

SUPREME COURT, U. S.

JAN 2 1970

JOHN F. DAVIS, CLERK

Number 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter

of

DAN A. SPENCER

On Appeal from the First Judicial
District Court, Caddo Parish, Louisiana

BRIEF ON BEHALF OF RESPONDENT TRIAL JUDGE IN SUPPORT OF MOTION TO DISMISS OR ALTERNATIVELY AFFIRM

JACK P. F. GREMILLION
Attorney General of the
State of Louisiana,

Attorney for the Honorable
R. B. Williams, Judge,
Respondent

MID-SOUTH PRESS, INC. SHREVEPORT, LOUISIANA

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Number 513

Supreme Court of the United States

290 Federal Supplement and will not be here repeated.[31]

In re Sawyer[32] concerned disciplinary proceedings against an attorney for out-of-court utterances. A concurring opinion by Justice Stewart correctly states the law as it existed then, as it historically has existed, and, we submit, as it exists now, concerning the duty of an attorney *vis a vis* free speech.[33]

> "* * * A lawyer belongs to a profession with inherent standards of propriety and honor which experience has

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31. See *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *In re Sawyer*, 360 U. S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473; *Fisher v. Pace*, 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 S. Ct. 492; *Cooke v. United States*, 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390; *In re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *Offutt v. United States*, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11; *Bloom v. State of Illinois*, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522; *Lanoix v. Home Indemnity Co. of New York*, 204 La. 1044, 16 So. 2d 834 (La. S. Ct. 1943); *In re Portland Electric Power Co.*, 97 F. Supp. 903 (U. S. D. Ct., Oregon, 1947); *Spencer v. Dixon*, 181 So. 2d 41, 248 La. 604 (La. S. Ct., 1965); *Fleming v. United States*, 279, F. 613 (C. C. A. 9th, 1922). Note the similarity of facts and issues in *Fleming* with the instant matter. These cases represent the controlling United States Supreme Court cases and a fair sampling of other federal and Louisiana cases developing contempt authority to its present state as concerns due process and free speech.

Additional lower federal court decisions concerning the relationship between due process and contempt include: *United States v. Seidmon*, 154 F. 2d 228 (C. C. A. 7th, 1946); *Shemaitis v. Reid*, 193 F. 2d 119 (C. C. A. 7th, 1951); *Howard v. United States*, 182 F. 2d 908 (C. C. A. 8th, 1950); *United States v. Moore*, 287 F. 879 U. S. D. Ct., E. D., New York, 1923); *Simon v. United States*, 62 F. 2d 13 (C. C. A. 9th, 1932); *Craig v. Baird*, 109 F. Supp. 496 U. S. D. Ct., E. D., Michigan S. D., 1952); *Camarota v. United States*, 111 F. 2d 243 (C. C. A. 3rd, 1940); *Clark v. United States*, 61 F. 2d 695 (C. C. A. 8th, 1932); *United States v. Schiffer*, 351 F. 2d 91 (C. C. A. 6th, 1965). For the sake of brevity, most of these cases will not be separately discussed in this brief.

32. 360 U. S. 622, 3 L. Ed. 2d 1473, 79 S. Ct. 1376.

33. 3 L. Ed. 2d 1489.

shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to these standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

In *Fisher v. Pace*[34] this court, in 1949, reviewed the contempt citation of a Texas attorney resulting from remarks made by that attorney directed to a trial judge. In response to the constitutional issues raised (including implicitly free speech), this court stated[35] through Justice Reed:

"Historically and rationally, the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary convictions and punishment accord due process of law.

* * *

"We see nothing in their opinion or conclusion that indicates any disregard of petitioner's right * * *. We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly in the last few sentences of the altercation."

The orderly administration of justice is the first bastion of a society dedicated to order through justice. If the judicial arm of that society cannot command order and decorum by its officers (attorneys) then this bastion is penetrated. Obviously the republic will not fall because of any decision in this case.

34. 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569.
35. pp. 573 & 574, 93 L. Ed.

Equally obviously, the judiciary will assume a new proportion if the practitioners of the noble profession of law may with impunity engage in the conduct sought to be licensed by appellant.

B. Constitutionality as Applied to Appellant

Mr. Spencer seeks to escape the inexorable effect of the authorities cited previously by arguing that the pleading filed contained allegations essential for the purpose sought—the recusation of the trial judge. He seeks to be protected also because he says he does not allege his belief of the abusive language, but rather quotes others; from this shield of quotation he says the attorney's immunity must follow.[36]

In support of this excuse for his license to defame, he relies on this Court's opinion in *Holt v. Virginia*.[37] In *Holt*, an attorney filed a motion for change of venue on the basis of alleged bias of the trial judge. This Court stated that the allegations of the pleading were "no way offensive in themselves, but wholly appropriate to charge bias in the community and bias of the presiding judge." Contrast this with the charge leveled by Mr. Spencer at the trial judge herein of "corruption, favoritism, oppression and misfeasance in office." Louisiana as contrasted with Virginia requires that criticism of a trial judge to be contumacious must be irrelevant. Louisiana as contrasted with Virginia provides detailed machinery for

36. Even Mr. Spencer withdraws this transparent shield at will. In his response to the rule, he affirmed his own belief in the truthfulness of the charge. Trial Court Record, page 25. In an attempted pleading (stricken because of its scurrilous content) before the United States District Court in the collateral part of this proceeding, he withdrew this shield. 290 F. Supp. at page 534.

37. 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375.

recusation of judges or change of venue.[38]

This Court properly held that a litigant has a constitutional right to a fair trial before an impartial tribunal; that corollary to this right is the right to file motions raising the necessary issues for this protection.

It is not the charge of bias that prompted this contempt citation. Indeed, if the facts had justified it, direct contempt could not lie had Mr. Spencer simply alleged: (a) Mr. Spencer's clients were attempting to remove Judge Dixon from office; (b) Judge Dixon was aware of this circumstance; (c) being apprised of the fact, Judge Dixon should be recused. These allegations, if true, would obviously be protected by free speech or indeed by a higher protection, the duty of an attorney to vigorously represent his client. It must be recalled that on March 20 of 1968, Mr. Spencer did not consider the existence of any grounds for recusation. Only after he received a decision with which he disagreed did he become aggrieved. His motion for recusation was filed on March 21, 1968. His motion for recusation nowhere claims that Judge Dixon was aware of any movement by Mr. Spencer's clients to remove him from office, if indeed this fact ever existed.[39]

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38. Louisiana Code of Civil Procedure, Articles 122 and 151-161.

39. Section 5, Article 9, of the Constitution of the State of Louisiana at that time provided that on petition of 25 taxpayers alleging misfeasance or corruption in office, the Attorney General must institute proceedings before the Supreme Court of Louisiana for removal of the judge against whom the complaint is made. Neither this proceeding nor the collateral federal court proceeding indicates the existence of any such petition. During the pendency of the federal court proceedings, with the inevitable unfavorable publicity flowing therefrom, Judge Dixon was elected by the voters of his district to the Second Circuit Court of Appeal, an intermediate Louisiana appellate tribunal, hardly an event consistent with the pendency of proceedings for his removal for corruption, favoritism and misfeasance.

The inclusion in the motion to recuse of the inflammatory offensive language "corruption, misfeasance and favoritism" added not one scintilla to the motion. Its inclusion was obviously a deliberate attempt to embarrass a trial judge against whom the counsel holds animosity.[40]

Mr. Spencer seeks to have this Court reverse the holding of the Louisiana Supreme Court in *Spencer v. Dixon*,[41] an unrelated proceeding in which Mr. Spencer accused the Louisiana Supreme Court of dishonesty. A facet of this argument deserves comment. In that proceeding, as reported, Mr. Spencer sought to recuse the Louisiana Supreme Court after he accused it of dishonesty. In this proceeding Mr. Spencer sought to recuse Judge Dixon by accusing him of corruption, misfeasance, etc. *Query*: can counsel effectively choose the judge to hear his case by the ingenious machinery of accusing the judge of dishonesty or worse? Obviously not. The orderly administration of justice requires that multiple-judge trial courts assign their cases impartially.

In Mr. Spencer's difficulty with the Louisiana Supreme Court, reported in *Spencer v. Dixon, supra*, he sought, as he now seeks, to claim violation of his due process rights grounded on the refusal to allow him to prove his allegation of dishonesty of the judiciary. *This issue is not presently before this Court.* At no time in these proceedings did Mr. Spencer offer any evidence to prove the truth of his allegation. At no time was he denied the right to present such evidence.[42]

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40. See excerpt from stricken pleading of counsel quoted on page 534 of 290 F. Supp. See Article 4 of Mr. Spencer's "Response to Rule," District Court Record, page 25.
41. 181 So. 2d 41, 248 La. 604 (1965).
42. Trial Court Record, page 42.

As contrasted with *Holt*, Mr. Spencer's inflammatory allegations simply were not necessary or even pertinent to his allegation of bias. As contrasted with *Holt*, Mr. Spencer's language was offensive in and of itself.

Another facet of this motion to recuse deserves comment. Article 3 of this motion claims that the trial judge ruled against Mr. Spencer despite "overwhelming evidence" entitling Mr. Spencer's client to the relief sought. This simply is not the case.[43]

This case (*Hopkins v. Hopkins*) is for separation from bed and board. This relief is statutory, provided by Louisiana Revised Civil Code Articles 138 (5) and 143. Two elements must coincide before a plaintiff is entitled to a separation grounded on abandonment, these elements being: (a) that the offending spouse has withdrawn from the common dwelling without a lawful cause, and (b) has consistently refused to return.[44] The testimony of Mr. Hopkins (Mr. Spencer's client) was that he and his wife separated by agreement. As properly interpreted by the appellate courts of Louisiana, a separation by agreement is not an abandonment.[45] It is true that Mr. Hopkins proved the second element of abandonment, the refusal to return. It is *not* true that he proved the initial abandonment.

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43. Although on the record filed by Mr. Spencer this Court would have no way of knowing. The transcript of the separation proceeding was not filed by him.

44. Louisiana Revised Civil Code, Article 143.

45. *Jardes v. Jardes*, 191 So. 2d 645 (La. 2nd Cir. Ct. of Appeal, 1966); *Sciortino v. Sciortino*, 188 So. 2d 224 (La. 4th Cir. Ct. of Appeal, 1966).

Louisiana, as other states, provides adequate remedy for any aggrieved litigant through appeal.[46] It is an interesting commentary that Mr. Spencer did not appeal, yet felt so thoroughly aggrieved by the trial judge's ruling that he characterized it as being "* * * despite overwhelming evidence of the abandonment * * * ."[47]

These circumstances are recited that this Court might place in proper context the action of Mr. Spencer in irrelevantly defaming a member of the judiciary. Within this context it ill behooves Mr. Spencer to seek redress from this Court claiming deprivation of substantial constitutional rights. Within this context we submit Judge Williams was completely correct in characterizing this criticism as irrelevant to the pleading filed.

C. Acquiescence

The statement of the case recited the collateral federal court proceeding by Mr. Spencer. Every substantial argument here propounded by him was painstakingly considered by that court and is completely answered in the opinion of that court reported in 209 Federal Supplement 351. A careful reading of that opinion will reveal that appellant urged nothing here which was not adjudicated there. The state court proceedings were stayed during that litigation. An appeal was taken to the Circuit

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46. In this instance, an absolute right of appeal lay with the Second Circuit Court of Appeal. Article 7, Section 29, Constitution of the State of Louisiana.

47. The minutes of *Hopkins v. Hopkins* (which are filed by appellee in the copy of the district court record) reveal that Mr. Spencer at no time took advantage of the protection afforded all litigants when they feel aggrieved, the right of appeal. Trial Court Record, pages 1 and 2. Rather he chose to attempt to recuse the trial judge in hopes that another trial judge might view the law differently.

Court of Appeals, 5th Circuit. Mr. Spencer voluntarily dismissed that appeal. The administration of justice in this country, considering the proliferation of constitutional and other federal litigation, has required that this Honorable Court be carefully selective in the cases it accepts, and that these cases be limited to those (under this type of jurisdiction) presenting substantial constitutional questions. When a litigant by choice enjoins a state court proceeding, is afforded a hearing in a lower federal court and voluntarily dismisses an appeal from an adverse decision, the action of the litigant cries loudly to the insubstantiality of the purported constitutional issue. For this reason alone this Court would be wholly justified in dismissing this appeal.

Respectfully submitted,

Signed: JACK P. F. GREMILLION

JACK P. F. GREMILLION
Attorney General of the
State of Louisiana

Attorney for R. B. Williams,
Respondent Judge

CERTIFICATE OF SERVICE

I, Jack P. F. Gremillion, a member of the Bar of the Supreme Court of the United States, attorney for the Honorable Richard B. Williams, respondent, certify that copies of the foregoing brief have been served on Mr. Dan A. Spencer, appellant, by mail addressed to him at Post Office Box 4215, Centenary Station, Shreveport, Louisiana 71104, postage prepaid, this _____ day of December, 1969.

Signed: JACK P. F. GREMILLION

Jack P. F. Gremillion
Of Counsel

SUPREME COURT, U. S.
FILED
MAR 16 1970
JOHN F. DAVIS, CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 513

IN THE MATTER OF
DAN A. SPENCER,

Appellant,

APPEAL FROM THE SUPREME COURT OF LOUISIANA

FILED AUGUST 25, 1969
JURISDICTION POSTPONED FEBRUARY 2, 1970

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 513

IN THE MATTER OF DAN A. SPENCER,

Appellant.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

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DOCKET ENTRIES

[1]

LEWIS P. HOPKINS, JR. — No. 182,404

v. — First Judicial District Court

DIANA McGINTY HOPKINS — Caddo Parish, Louisiana

Jan. 10, 1968 Default

Mar. 20, 1968 On application to confirm default, evidence adduced, closed and matter submitted. Judgment rendered in favor of Defendant rejecting the demands of the Plaintiff (see decree). (Judge Dixon)

Mar. 22, 1968 Motion for new trial limited to rehearing filed March 21, 1968. Motion to recuse filed March 21, 1968 by Plaintiff.

Mar. 27, 1968 Motion and order filed March 22, 1968 by Plaintiff to fix time for filing Writs of Certiorari and Mandamus to the Supreme Court of Louisiana on or before March 27, 1968.

Mar. 27, 1968 Motion for recusation filed March 26, 1968 by Dan A. Spencer.

Mar. 27, 1968 Notice of intention to apply for writs of certiorari prohibition and mandamus filed this day by Dan A. Spencer.

Mar. 29, 1968 The Court ordered the rule returnable this day continued until the determination of proceedings # 13,676 filed in the U.S. Federal Court, Western District of Louisiana. (Judge Dixon)

Apr. 3, 1968 Motion and order filed April 2, 1968 to have contempt proceedings transferred to the Twenty-Sixth District Court for hearing.

Apr. 17, 1968 Certified copy of order from Supreme Court, State of Louisiana assigning Judge R. B. Williams of the Tenth Judicial District Court to hear contempt rule

filed in this case and ordering that the previous order issued that Judge Enos C. McLendon, Jr. hear this rule be revoked and set aside.

Jun. 10, 1969 Regularly taken up on rule to show cause. Mr. Dan A. Spencer present in Open Court and stating to the Court that he would represent himself in this matter. Response to rule filed by Mr. Spencer. The Court ruled that the testimony of the District Judges summoned as witnesses would be inadmissable. Case was argued by Mr. Spencer, closed and matter submitted. Judgment rendered finding Mr. Dan A. Spencer guilty of contempt of Court. The Court afforded Mr. Spencer an opportunity to purge himself of contempt, which he declined. The Court sentenced Mr. Dan A. Spencer to serve 24 hours in jail and to pay a fine of $100.00 and costs. Mr. Spencer gave notice of applying for writs of certiorari to the Supreme Court of Louisiana. The Court ordered a stay of execution of sentence until Friday, June 13, 1969 for said application. (Judge Williams)

[2]

Jun. 27, 1969 Certified copy of order from Supreme Court of Louisiana denying writ of certiorari applied for by Dan A. Spencer. Motion and order filed June 26, 1969 by Dan A. Spencer to stay execution of sentence for a period of 30 days to allow him to apply for writ of certiorari to the United States Supreme Court.

Aug. 20, 1969 Certified copy of order from Supreme Court of the United States staying the execution of sentence imposed by First Judicial District Court for the timely filing of an appeal or petition for writ of certiorari filed August 18, 1969.

[3]

[Caption Omitted in Printing]

PETITION

The petition of LEWIS P. HOPKINS, JR., a resident of Caddo Parish, Louisiana, with respect shows:

1.

That he was married unto the defendant herein, DIANA McGINTY HOPKINS, in Shreveport, Louisiana, on April 20, 1963.

2.

That the matrimonial domicile was immediately established in Shreveport, Caddo Parish, Louisiana, where it has since remained.

3.

That born of the union of petitioner and defendant was one child, Patrick Evan Hopkins, born November 18, 1964, said minor child being in the custody and control of defendant and petitioner desires that defendant be awarded the temporary, provisional and permanent custody of the said minor child, petitioner to pay unto defendant, for the support of the said minor child, the sum of SEVENTY-FIVE AND NO/100 ($75.00) DOLLARS per month.

4.

That on November 25, 1967, defendant asked petitioner to leave, stating that if he did not do so that she would leave.

5.

That petitioner has not condoned the actions of the defendant and the same renders further living together with her insupportable.

6.

That due to the aforementioned constructive abandonment, petitioner desires and is entitled to a separation from

[4]

bed and board "a mensa et thoro" between them.

WHEREFORE, plaintiff prays that the defendant, DIANA McGINTY HOPKINS, be duly cited to appear and answer this petition, that she be served with a copy of the same, and after due proceedings and legal delays had, that there be judgment herein in favor of plaintiff, LEWIS P. HOPKINS, JR., and against defendant, DIANA McGINTY HOPKINS, decreeing a separation from bed and board "a mensa et thoro" between them.

/s/ Dan A. Spencer
Suite 7, Dixie Building
1639 Kings Highway
Shreveport, Louisiana
Attorney for Petitioner

TRANSCRIPT OF TRIAL ON CONFIRMATION OF DEFAULT

[31]

[Caption Omitted in Printing]

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EVIDENCE adduced and proceedings had on the trial of the above entitled cause at Shreveport, Louisiana, on March 20, 1968, before His Honor, JOHN A. DIXON, JR., Judge of the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana.

APPEARANCES: MR. DAN SPENCER, Counsel for the plaintiff;

MRS. LAURINE K. BROWN, Official Court Reporter.

- - 0 - -

PROCEEDINGS

MR. SPENCER: If the Court please, this is a suit for separation based upon abandonment. The defendant is present in court, Your Honor, although unrepresented by counsel, and she is agreeable to the amount mentioned by way of child support.

LOUIS P. HOPKINS, JR.

plaintiff, called as a witness on his own behalf, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. State your name and address, please. A. Louis P. Hopkins, Jr., 2045 Flournoy-Lucas Road.

Q. To whom are you married? A. Diana M. Hopkins.

Q. When and where were you married to her? A. Here in Shreveport.

Q. And when was that, sir? A. March 20, [illegible].

Q. Do you have any children? A. One.

Q. One child was born of the marriage? A. Yes.

Q. Would you tell the Court, please, what happened on November 25, 1967? A. Well, we had an argument and everything, and it was decided either she leave or I leave and so I thought for the benefit of her and the child that I left. And a couple of days later I came home and she had left and the house was vacant. My clothes were there.

Q. Since that time have you asked her to return to live with you? A. Yes.

Q. And what was her answer? A. No.

Q. Mr. Hopkins, are you agreeable to her having custody of the child and paying Seventy-five Dollars per month child support? A. Yes.

MR. SPENCER: Does the Court have any questions?

THE COURT: No, but I can't grant you a separation on that evidence.

MR. SPENCER: Your Honor, that is not all the evidence.

THE COURT: I can't grant you a separation as long as I believe this testimony.

(Witness excused.)

CHARLES EDWARD ANDERSON

called as a witness on behalf of the plaintiff, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. State your name and address, please. A. Charles Edward Anderson, the Third, 2048 Hawthorne Lane, Red

Q Mr. Anderson, do you know the plaintiff in this action, Mr. Louis P. Hopkins? A. Yes.

Q Do you also know his wife, Diana Hopkins? A. Yes.

Q Do you know whether or not they have lived together since November 25, 1967? A. They have not.

Q How do you know that, Mr. Anderson? A. Because he has lived with me since that date.

Q You share an apartment now? A. Yes, sir.

Q. Have you ever had an occasion to overhear a conversation overhear conversations between Mr. Hopkins and his wife relative to a reconciliation? A. Yes, sir, on a couple of occasions.

Q Well, what have you heard? A. Well, he would call her and ask her if she would have him back and she said no, if no over with.

MR SPENCER Does the Court have any questions?

THE COURT No.

[34]

(Witness excused.)

MR SPENCER Would the Court like to hear from the defendant in the case? She is present in court.

THE COURT No. The suit is based on abandonment. The testimony of the plaintiff was that he and his wife had an argument and they decided that either he leave or she leave, so he left. That is not an abandonment. The demands of the plaintiff are rejected.

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CERTIFICATE

I, Mrs. Laurine K. Brown, Official Court Reporter, First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, do hereby certify that the above and foregoing 4 pages of typewritten matter constitute a true and correct report and transcript of the testimony and proceedings had on the trial of this cause at the time and place hereinbefore set out on page 1 hereof.

IN WITNESS WHEREOF I have hereunto affixed my signature at Shreveport, Louisiana, this the 21st day of March, 1968.

/s/ (Mrs.) Laurine K. Brown,
Official Court Reporter.

[7]

[Caption Omitted in Printing]

MOTION AND ORDER FOR RECUSATION

NOW INTO COURT, through undersigned counsel, comes LEWIS P. HOPKINS, JR., plaintiff in the above captioned matter, who with respect represents:

1.

That the instant proceeding is an uncontested suit for separation from bed and board based upon abandonment.

2.

A preliminary default was entered herein on January 5, 1968.

3.

That on March 20, 1968, the instant proceeding was brought before the Court for confirmation of default and despite overwhelming evidence of the abandonment of petitioner by defendant, the trial judge, Honorable John A. Dixon, Jr., dismissed plaintiff's suit giving as the oral reasons therefor that the plaintiff had not proven a case of abandonment.

4.

The plaintiff herein, LEWIS P. HOPKINS, JR., and his chief witness in this case, Mr. Charles Anderson, III, are presently engaged in the process of attempting to have Judge Dixon, removed from office as being unfit therefor

by virtue of corruption, favoritism, oppression and misfeasance in office.

5.

Plaintiff alleges, on information and belief, that Judge Dixon, First Judicial District Court for Caddo Parish, Louisiana, is therefore interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward plaintiff in that he would be unable to give a

[8]

fair trial in this matter.

6.

Plaintiff has applied for a new trial limited to rehearing in this matter and alleges, on information and belief, that for the reasons set out hereinabove, the Honorable John A. Dixon, Jr., would be unable or unwilling to give a fair and impartial rehearing in this matter.

7.

Plaintiff alleges, on information and belief, that Judge John A. Dixon, Jr., First Judicial District Court for the Parish of Caddo, is interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward counsel for plaintiff that he was unable or unwilling to give a fair trial in this matter.

8.

Although counsel for plaintiff was aware of animosity on the part of the trial judge herein prior to the attempted confirmation of default, he was not aware, and the plaintiff was not aware, that the aforesaid animosity, bias, prejudice and interest would prevent a fair trial in this matter.

WHEREFORE, plaintiff respectfully prays that the Honorable John A. Dixon, Jr. recuse himself in this cause or refer this motion to another judge or a judge ad-hoc for a

hearing in accordance with Article 155 of the Louisiana Code of Civil Procedure and the rules of the First Judicial District Court.

/s/ Dan A. Spencer
Suite 7, Dixie Building
1639 Kings Highway
Shreveport, Louisiana

Attorney for Plaintiff

[12]

[Caption Omitted in Printing]

ORDER FOR RULE TO SHOW CAUSE

In the above numbered and entitled cause.

IT IS ORDERED that a rule issue herein directed to Dan A. Spencer, attorney for plaintiff, directing him to show cause on Friday, March 29, 1968, at 10:00 a.m. in the courtroom of Section "B", First Judicial District Court in and for Caddo Parish, Louisiana, why he should not be held in contempt of court for the following, to-wit:

That on March 21, 1968, Dan A. Spencer did file a pleading in the above numbered and entitled cause which contained scandalous, insulting, and abusive language in irrelevant criticism of the judge of said court, which pleading is attached hereto and made a part hereof, and which language, particularly in paragraph four thereof, impairs the dignity of the Court and the respect for its authority, contrary to the law of the State of Louisiana.

THUS DONE AND SIGNED on this, the 26th day of March, 1968.

/s/ John A. Dixon, Jr.
District Judge

[24]

[Caption Omitted in Printing]

RESPONSE TO RULE

NOW INTO COURT comes DAN A. SPENCER made respondent by an Order for Rule to Show Cause why he should not be held in contempt of Court, issued on the 26th day of March, 1968, by John A. Dixon, Jr., then District Judge of the First Judicial District Court, Parish of Caddo, State of Louisiana, who with respect shows:

1.

The original order for rule to show cause herein is no longer valid as the judge issuing the same is no longer a judge of this Honorable Court and all of the issues raised thereby are rendered moot and irrelevant.

2.

Another Judge, of another Court, has no authority to issue a new rule to show cause against respondent for an alleged contempt committed against a Judge of a different court.

3.

Respondent is charged with apparent violation of the Louisiana Code of Civil Procedure Article 222(3). The foregoing Article provides that a direct contempt of court includes

> (3) "Use of insulting, abusive, or discourteous language by an attorney or other person in open court, or in a pleading, brief, or other document filed with the court in irrelevant criticism of another attorney or of a judge or officer of the court."

The Order for Rule to Show Cause provides that the alleged contumacious conduct consisted specifically of the language contained in Paragraph 4 of a Motion to Recuse filed in this case. Paragraph 4 of the said Motion provided:

> "The petitioner herein, LEWIS P. HOPKINS, JR. and his chief witness in this case, MR. CHARLES ANDERSON, III are presently engaged in the process of attempting to have JUDGE JOHN A. DIXON, JR. removed from office as being unfit therefore for virtue of corruption, bias, prejudice and misfeasance in office."

The foregoing allegations of the Motion to Recuse alleged only the actions of other persons which would result in bias, prejudice and animosity on the part of a trial judge. The allegations formed a necessary part of any Motion to Recuse and were thus not only relevant and material but an absolute requirement of any such Motion. This takes it out of the provisions of Article 222(3).

Moreover, this did not constitute the use of insulting or discourteous language by an attorney in criticism of a judge but only alleged the actions of other persons. The Motion to Recuse did not contain allegations regarding the truth or falsity of MR. HOPKIN'S or MR. ANDERSON'S charges against Judge Dixon.

Further, the aforesaid allegations of the Motion to Recuse constituted only a description by an attorney of actions by other persons. Such a description, where relevant and material to the pleading in which it is contained, as is clearly the case here, could never constitute a contempt under Article 222 of the Louisiana Code of Civil Procedure.

4

In further defense to the rule to show cause, respondent pleads the truth of all of the charges brought against Judge Dixon on the Motion to Recuse. The hereinabove described

expressions by respondent are a constitutionally protected exercise of free speech.

5.

The Order for Rule to Show Cause herein was issued by then JUDGE JOHN A. DIXON, JR. with the knowledge that the conduct

[26]

of the respondent did not in any respect constitute a contempt of Court and with no hope of securing a valid conviction of respondent. JUDGE JOHN A. DIXON, JR. acted out of personal animosity and bias toward respondent in an attempt to summarily impose an illegal punishment and to discourage constitutionally protected and truthful criticism of himself.

WHEREFORE, respondent prays that the rule issued herein directed to him be withdrawn, recalled and set aside.

Dan A. Spencer
690 East Kings Highway
Shreveport, Louisiana

TRANSCRIPT OF PROCEEDINGS ON CONTEMPT RULE

[36]

[Caption Omitted in Printing]

Proceedings had in rule to show cause before His Honor R. B. Williams on the 10th day of June, 1969, in the courtroom of the Court of Appeals, Shreveport, Louisiana.

APPEARANCES:

MR. DAN A. SPENCER, respondent.

Ray J. Hanrahan, court reporter.

THE COURT: All right, Mr. Spencer, we will proceed with the matter which was originally in the case of Hopkins versus Hopkins. Do you have your file?

MR. SPENCER: Yes, sir.

THE COURT: Mr. Spencer, are you representing yourself?

MR. SPENCER: Yes, sir, I am.

THE COURT: This, shall we say, will be between yourself and this Court?

MR. SPENCER: Yes, sir.

THE COURT: I do not think that there is any other party at interest other than the official body of the Court, as I see it, and this Court is to pass on the question of whether or not in making the filings and addressing it to the Court, as was done in this case, as I will say in the Hopkins versus Hopkins case, consists of a contempt of the body to which it was addressed. I am going to first address myself to your response to the rule. The response to the rule indicates a

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question by you of the type of procedure; this is, the continuation of the rule and the resetting of it by this Court.

MR. SPENCER: Yes, sir, that's right.

THE COURT: And then you address yourself secondly in your response to the rule that, to use your words, that you did not use the words as if they were your words but an expression that someone else was to have made. And thirdly, that even if it were considered an expression of yours that the words within themselves and the addressing of them to the Court was not intended to say that the Court itself was guilty of these particular items but that it was alleged that it was to be addressed to show by a third person that there was evidence. Am I interpreting you correctly?

MR. SPENCER: I would differ in only one respect with your summation of the response, and that is this: The allegations in question came in a motion to recuse, and it is my contention that my description of the activities of other persons in attacking Judge Dixon and his continuing to sit on the bench in this particular case did not constitute such an attack by me for which I could be punished for contempt, but rather a privileged communication in that there were grounds for recusation of Judge Dixon in the case to indicate bias on his part, not toward me but toward the people I represent, and I would suggest that is an important distinction.

THE COURT: But in part of your allegations you involve yourself by saying that as a result of the apparently previous developments that you attributed to the Judge it shows such personal animosity toward you that it brings about a distinction in his viewing the matter to the extent that he would pre-judge the matter as against you rather than upon the merits of the

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case, and that is the allegation made in the motion for recusation but attributed to someone else as you are representing it. Is that your position too?

MR. SPENCER: Your honor, I agree that there is such an allegation in the motion to recuse but since it was not

set forth in the rule to show cause, I assumed that it was not material to this. Only one paragraph of the motion to recuse is set out in the rule to show cause.

THE COURT: We can't overlook anything, Mr. Spencer, in this matter, because it is both material to the Court and also material to you. And, of course, I view every word as a very material item, particularly when it is in the province of whether or not you have violated shall we say your oath of respect. Now, since I have clarified that issue the issue may stand, and I will first pass on this rule. If you have anything further to say on your response to the rule I will be glad to hear it.

MR. SPENCER: I would appreciate an opportunity to argue some points which I think will probably come before any eventual hearing.

THE COURT: Yes, sir, all right.

MR. SPENCER: First, as pointed out, Judge Dixon is no longer a member of the Court and in view of the fact that the allegation was directed to him personally I would submit the issue is now moot. Further, I would submit that the fact that a rule to show cause is issued and not held at the time set forth in the rule requires the issuance of a new rule before any action can be taken. I have not been served with notice to appear and show cause on this date. I was notified orally by the Clerk's office, admittedly, but I was not served, and that is required by the Code of Civil

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Procedure in the provisions dealing with summary proceedings. What is true on a summary proceeding in an ordinary civil case is not necessarily true with a contempt proceeding, which is pointed out in the brief. Contempt proceedings are subject to strict construction, just as are criminal proceedings. In fact, the Code of Civil Procedure specifically provides that only cases which are defined as contempt are to be considered as such. We don't have an

Louisiana the general rules of contempt which are found in many jurisdictions. We have a strict statutory form of offense and the contempt is limited as to what is defined by the statute as contempt. I will point out further, in view of what Your Honor stated a moment ago about considering all of the motion to recuse, I have no objection to defending myself on the charges with respect to part of that, but if contempt proceedings are subject to strict construction and the Code must be strictly followed, well, in that case I suggest that a rule to show cause must be issued against me charging me with contempt by these other matters the Court has referred to. In view of the fact that they were not contained in the rule to show cause, I didn't think it was necessary to refer to that here.

Going on to the issue of just what is the contempt here, or what is the allegation, I would point out that any criticism which the Court might find in the motion to recuse is pertinent and relevant, and the definition of contempt in Article 222, Section 3, requires that the criticism of the Judge be irrelevant.

Now I have cited two cases in the memorandum in support of this response to the rule which dealt with identical situations we have here today. In State v. Simone and State v.

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Nunez, both decided by the Supreme Court of Louisiana, the Court held that allegations in the motion to recuse were necessary and basis for the recusal of the Judge. In fact, as I would point out, in a previous attempt to recuse Judge Dixon another Judge of the First District Court overruled the motion for the very reasons that we did not set out the grounds for the recusal. We had to in his opinion state why he was biased and prejudiced and couldn't try the case. It is a necessary allegation, certainly, it is a pertinent allegation. And as pointed out in State v. Simone and State v. Nunez, although the trial judge may find that unpleasant,

THE COURT: Mr. Spencer, the Court, of course, has done a good bit of research himself. This in its entirety was in the newspapers. And the Court is aware of the severity of a contempt made before any Court and to anyone who is a practicing attorney, like yourself, and the Court has decided that it would not be admissible to have witnesses on the question of what may have taken place outside and happened subsequent to the filings. The Court must take into consideration only the filings themselves as to what impact they would have between counsel and the Court. Now, the Court will make this ruling insofar as the anticipated calling of witnesses in this field of what you have indicated to the Court. I will rule that if the witnesses were called I would not permit their testimony to be entered into the record. The only matters that may be entered into are, first, your response to the rule in which there is no attempt on your part

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to say you didn't sign it or that you weren't there or something of that sort, and, second, no attempt on your part to disavow the instrument in some part or other. Those two matters you more or less indicated to the Court your position on. I am not attempting to have you commit yourself because what you have stated to the Court is the truth, exactly what you have done. Now it becomes this Court's duty to advise you as to what my attitude is or what my decision is towards the filings made by an attorney. You are in a different category than say the witnesses or the layman. Now for this ruling, you have the privilege, of course, of taking whatever exception you have.

MR. SPENCER: If Your Honor please, I don't mean to be discourteous and interrupt you, but some of the things you referred to I think are matters on which we have very little jurisprudence. I have found some. It is not in my brief because I didn't anticipate this question of calling witnesses. But if I may, I would like to refer to the Code

THE COURT: The Court feels he will be glad to see what you have to offer.

MR. SPENCER: Thank you, Your Honor. I don't have this set out but if I can have two minutes I can find it.

THE COURT: The Court will recess for five minutes.

(After said recess the proceedings were resumed as follows:)

THE COURT: Mr. Spencer, do you have something you wish to show the Court?

MR. SPENCER: Yes, sir, Your Honor, I would like to point out one further case which is not contained in my brief. The case is Louisiana State Board of Medical Examiners v. England contained in [illegible] Louisiana, [illegible] In that case it was

(344)

held that a rule for contempt must state specifically the time which the alleged contempt occurred or be quashed. In other words I am referring to the rule for contempt in the specifications one attack of the motion for [illegible] the second case I would like to cite to the Court is Mr. Stewart's Rural Life Insurance Co. which is not contained in my brief. In that case the Court held that [illegible] committed in the actual presence of the Court [illegible] punished summarily and that all other cases it must [illegible] and allow the person charged to [illegible] and allow the person charged to [illegible] available.

THE COURT: I think [illegible]

avowal of the filing of the document that you didn't do it, that someone else did it. Now, those are the two points that the Court feels would be a proper area for the Court to check into.

Now, if you have nothing else, the Court rules that the testimony of the subpoenaed witnesses, who, as I understand from you, are the District Court Judges of the First Judicial District Court, comprising, is it four men?

MR. SPENCER: Yes, sir.

THE COURT: Do you wish to name them, Mr. Spencer? If you do, I will let them go on the record.

MR. SPENCER: I don't believe it is necessary, Your Honor.

THE COURT: The Court rules that this testimony would be inadmissible. The Court has the record before it, based upon your response to the rule and your memorandum, which the Court has read rather hurriedly but with the intent of trying to understand your position. The Court rules that this testimony would not be admissible.

Now, did you have anything further to say?

MR. SPENCER: No, sir. Your Honor, only to make the offer of proof to the effect that I have stated earlier, and since the Court ruled it inadmissible, I will rest my case.

THE COURT: All right. Mr. Spencer, the Court will address these remarks completely to you and to no one else, and this is what the Court finds. The Court finds that there is an instrument subsequent to the legal or a matter seeking a separation from bed and board which was, I think, identical in the terminology of a motion and order for recusation, although it was in the name of your client, which in a sense you are the alter ego of that person. The motion of this motion and order for recusation addressed to a member of the Court, of the First Judicial District Court, who was the trial judge, the Honorable John V. Brown, Jr., and the Court paraphrases at this point in time to your document

that the District Judge is no longer in the office. The thrust of your argument is that what was said by you or through your client addressed to a person. That is not your privilege. Your privilege in addressing a matter to a representative of the State and the Judiciary means that you are addressing it to the office that is occupied by the individual. You, as a member of the Louisiana State Bar are not as privileged as some other persons are because of your high position and you are an officer of this

[36]

Court. When you use the words in addressing it to the District Judge that he is guilty of [illegible] by virtue of corruption, favoritism, oppression and mismanagement of office, when you use those words you have addressed to that Court an expression which is defamatory of not only the person but the Court. In doing so you bring about that area of reaction not only to the members of the bar but to the general public, an area of condemnation without any necessity.

In this particular case we had a suit for deportation heard and heard. The rights of the parties, as you well know, may be protected by a proper appeal from a judgment whether it was rendered in the manner in which you have expressed it or not. So we shall not [illegible] by virtue of corruption, favoritism, oppression and mismanagement of office. To do so would create immensely [illegible] and interest would [illegible] that would present a [illegible] of the matter. It is only when you are attributing to a member of the Judiciary and a member of the Federal Judiciary [illegible] that he died already indicted [illegible].

[illegible]

m. first, the rule which you have indicated should be very technically carried out. The delay of the first rule was a matter which addressed itself to you and you alone because you found that you should proceed through a proper device

[47]

of injunctive process which upset the first hearing and it would be giving to you the real control if a new rule had to be issued. And therefore, the Court rules that the hearing is proper and of course, what follows the Court deems to be proper.

The question now presented for me to answer and which I will start out by saying it is my opinion that they are contemptuous within their nature, that the statements contained in your motion to recuse speak for themselves. They are, as stated in one of our other famous cases, defamatory and there is no necessity for me to apprise you because you were the author thereof and you know what the contempt was.

It is not proper to address a member of the Court in that manner, because you are addressing the Court saying he has decided before he has heard the case and that he has reached a decision regardless of what evidence you have been able to bring into Court and that he in his capacity as District Judge was willing to misconstrue and determine in advance what the conclusions were going to be that were reached in this particular case.

It isn't always an important vehicle although it was important to Mr. or Mrs. Hopkins for a separation but the case itself is a rather simple matter. And the use by counsel of abusive language addressed to the Court cannot be overlooked and it does not mean simply that an attorney because of his relationship with the Court can excuse himself because he signed as it he was representing the party. Our Courts have held that even where it is signed in that manner that a duly qualified and licensed attorney

who files an instrument which within itself is defamatory and contemptuous of the Judiciary to which it was addressed is likewise in contempt of the

Court

The Court finds that there is contempt Mr Spencer and I therefore will address myself to you I believe in such instances in which a Court finds one guilty of contempt that is that person in turn wishes to address the Court in mitigation to attempt to or to actually purge one's self of contempt I am sure that would grant that privilege to you And I now call upon you since the Court has ruled that you are in contempt of Court I ask you do you wish to address yourself to the Court to attempt to purge yourself of such contempt or do you not choose to do so?

MR SPENCER I have no further argument to make Your Honor

THE COURT Mr Spencer Would you please stand in front of the Court I am sure that you are fully aware of what the Court is faced with and the onerous task that I have who lie no knowledge of your life and no knowledge of your family life no knowledge of your practice that was known to an individual that is before the and it is not [illegible]

The Court feels though that you serve in a high office and in that office you owe yourself the duty of being fully aware of and to anticipate the things that bring disrepute upon the bar and upon the bench and upon yourself And in pursuit this Court feels that it can only do what the law as it does provide Therefore the Court in finding [illegible] guilty of contempt follows the provisions of the law with reference thereto The Court therefore is limited in what he can say here and has very carefully set out [illegible] The Court therefore sentences you Mr Dan V Spencer [illegible]

hours in the District Jail in the Caddo Parish Jail and fines you the sum of $100 and costs.

MR. SPENCER: If the Court please, I would like to move for a stay of execution of sentence in order to allow time for an application for writs of certiorari to the Supreme Court of Louisiana.

THE COURT: That is granted.

MR. SPENCER: Thank you, Your Honor.

THE COURT: You have the time prescribed by law. I think that is a certain number of hours, isn't it?

MR. SPENCER: I am not aware of the time. There are two procedures I believe that can be followed, and one requires this Court to fix the time within which I can make the application. I should think that 15 days would be ample time, Your Honor.

THE COURT: I think that is excessive. The Court will grant you through Friday, June 13th, 1969, in which to apply for writs of certiorari to the Louisiana Supreme Court. Is that what you are applying for?

MR. SPENCER: Yes, sir. I will be applying to them. I take it once the writs are filed with the Court, the application.

THE COURT: If they grant the writs then the hearing is, of course, set by the Supreme Court. But if they don't grant the writs, then you will be expected to, well, of course, you know what happens after that.

MR. SPENCER: Yes, sir.

THE COURT: All right. The Court will stand adjourned.

SUPREME COURT OF LOUISIANA
New Orleans, 70112

LEWIS P. HOPKINS, JR. : June 26, 1969

DIANA McGINTY HOPKINS : No. 49,925

In re: Dan A. Spencer applying for writ of certiorari

Writ refused.

There is no error of law in the ruling complained of.

s/ JWS
s/ JBE
s/ JBH
s/ WBH
s/ MEB

McCALEB, J., is of the opinion that the application should be granted.

SUMMERS, J., is of the opinion the writ should be granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, June 26, 1969

s/ Harold A. [Illegible], Jr.
Deputy Clerk

8) Although counsel for plaintiff was aware of animosity on the part of the trial judge herein prior to the attempted confirmation of default, he was not aware, and the plaintiff was not aware, that the aforesaid animosity, bias, prejudice and interest would prevent a fair trial in this matter.

On March 29, 1968 Judge Dixon issued a contempt rule which read in pertinent part:

> "That on March 21, 1968, Dan A. Spencer did file a pleading in the above numbered and entitled cause which contained scandalous, insulting, and abusive language in irrelevant criticism of the judge of said court, which pleading is attached hereto and made a part hereof, and which language, particularly in paragraph four thereof, impairs the dignity of the Court and the respect for its authority, contrary to the law of the State of Louisiana" (A. 10).[2]

Judge R. B. Williams of the Tenth Judicial District Court was appointed to hear the contempt proceedings, which convened on June 10, 1969.

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[2] On March 28, 1968, appellant instituted an action in the United States District Court for the Western District of Louisiana, reported as *Spencer* v. *Dixon*, 290 F. Supp. 531 (1968). Appellant sought to enjoin further proceedings upon the contempt citation and sought money damages for violation of his constitutional rights. 290 F. Supp. at 532. He alleged, *inter alia*, that Articles 221, *et seq.* of the Louisiana Code of Civil Procedure, detailing contempt, were unconstitutional on their face and as applied and that the contempt citation against him violated the Fifth, Sixth, and Fourteenth Amendments, in that it subjected him to trial by the judge who had cited him for contempt. 290 F. Supp. at 532-533. The court issued a temporary restraining order but on March 29, 1968, amended it to allow its vacation should a judge other than Judge Dixon, who had issued the contempt citation, be assigned for the hearing. 290 F. Supp. at 533.

Appellant thereafter voluntarily moved for dismissal of his appeal in the Fifth Circuit.

The entire proceeding consisted of a dialogue—part law, part fact—between appellant and Judge Williams (A. 14-26). No evidence was introduced by either side.[3] Judge Williams commented that

> "The only matters that may be entered into are, first, your response to the rule—in which there is no attempt on your part to say you didn't sign it or that you weren't there or something of that sort—and, second, no attempt on your part to disavow the instrument in some part or other" (A. 20).

Solely upon the motion to recuse,[4] Judge Williams found appellant guilty of contempt. He said (A. 23):

> "The thrust of your argument is that what was said was said by you or through your client addressed to a person. That is not your privilege. Your privilege in addressing a matter to a representative of the State and the Judiciary means that you are addressing it to the office that is occupied by the individual. You as a member of the Louisiana State Bar are not as privileged as some other persons are because of your high position, and you are an officer of this Court. When you use the words in addressing it to the District Judge

[3] Appellant sought to offer testimony by four of the judges of the First District Court "to the effect that Judge Dixon consulted them regarding this matter and that they had advised him that contempt proceedings were not advisable, the thrust of it being that Judge Dixon did not institute this contempt proceeding with any hope of getting any valid conviction. I would also call those judges as character witnesses for myself and as persons who have knowledge of the lengthy disputation between Judge Dixon and myself" (A. 19). Judge Williams ruled that testimony inadmissible (A. 20).

[4] Judge Williams had not witnessed the alleged contempt.

that he is unfit—'Unfit therefor by virtue of corruption, favoritism, oppression and misfeasance in office' —when you use those words you have addressed to that Court an expression which is defamatory of not only the person but the Court. In doing so you bring about that area of reaction not only to the members of the bar but to the general public, an area of condemnation, without any necessity.

In this particular case we had a suit for separation from bed and board. The rights of the parties, as you well know, may be protected by a proper appeal from a judgment, whether it was rendered in the manner in which you have expressed or not. So we address ourselves solely to the verbage and its meaning. 'Unfit by virtue of corruption, favoritism, oppression and misfeasance in office.' The result meaning animosity, bias, prejudice and interest against you personally that would prevent a fair trial of the matter. It is indicative that you are attributing to a member of the Judiciary and a member of the First Judicial District Court that he had already judged this case.

It is true that a question of contempt is peculiar to each individual case. You have alleged that these expressions were those of your client, but in reality it is an expression of your own and of your own ego."

Appellant was sentenced to twenty-four hours in jail and was fined $100.00 and costs.

Summary of Argument

I(A). The Code of Professional Responsibility requires a lawyer to proceed zealously on behalf of his client without fear of personal penalties, and the Constitution protects such "'fearless, vigorous, and effective advocacy'." *Offutt* v. *United States*, 348 U.S. 11, 13 (1954). See also *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); Canons 6 and 7, Code of Professional Responsibility. In the face of this unmistakable duty, Art. 222(3) must be seen as an abridgement of the First Amendment on its face. It directly forbids "insulting, abusive, or discourteous" speech of "irrelevant criticism," leaving the final judgment to the subjective discretion of a judge, instead of requiring that the words be "court disrupting . . . " *In re Oliver*, 333 U.S. 257, 274 (1948). See also *Holt* v. *Virginia*, 381 U.S. 131 (1965); *In re McConnell*, 370 U.S. 230 (1962). Moreover, in this case, where classic and lawyer-like language alleging bias was used, the application of Art. 222(3) offends the First Amendment. To find appellant guilty of contempt is to draw too rigid a line between the standards for in-court and those which have been established for out-of-court contempt. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). To sustain the contempt conviction here would be to exclude the First Amendment from the courtroom.

I(B). Art. 222(3) is a vague and overbroad enactment. It is vague because it leaves a lawyer to wonder at the meaning of such subjective and indecisive words as "insulting" and "abusive." See *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Burstyn* v. *Wilson*, 343

U.S. 495 (1954). It is overbroad because it can reach unintentional conduct and because it fails to distinguish expression that obstructs proceedings from that which does not. *In re McConnell, supra; In re Michael*, 326 U.S. 224 (1945). See also *United States* v. *Robel*, 389 U.S. 258 (1967). A contempt statute which does not by its terms or as construed require obstruction of justice is dangerously overbroad, not only because it directly touches speech but also because the summary nature of contempt proceedings requires the strictest standard of constitutionality.

II. No evidence supports appellant's contempt conviction, as required by due process. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961). Appellant's motion for recusation asserted a fact describing conduct engaged in by his client which could lead to the fair conclusion that the judge would be biased against the client. The conduct referred to was described in words taken from the Louisiana Constitution, Art. IX, Sec. 1, and from the Louisiana Code of Civil Procedure, Art. 151(5). Not only was the motion not evidence of "insulting, abusive or discourteous" words of "irrelevant criticism," it was a restrained and professional effort, clearly proper in relation to the duty a lawyer owes his client.

ARGUMENT

I.

Art. 222(3) on its face and as construed and applied in this case violates the First Amendment.

Introduction

Canon 7 of the Code of Professional Responsibility admonishes the bar to "represent a client zealously within the bounds of law."[5] In explanation of this duty, Sec. EC 7-3 of Canon 7 provides that " . . . While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law," and Sec. EC 7-4 provides:

> The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

This recognition of a lawyer's professional responsibility is grounded not in ethics alone but in constitutional doctrine as well. Recognizing that the rights of litigants

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[5] The new code adopted by the House of Delegates of the American Bar Association became effective January 1, 1970. *Cf.* Canon 15, Canons of Professional Ethics.

depend substantially on the vigor and competence of counsel, this Court said in *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

This Court has also said that "counsel must be protected in the right of an accused to 'fearless, vigorous, and effective' advocacy . . . " *Offutt* v. *United States*, 348 U.S. 11, 13 (1954). And obviously, as this Court has made clear, the fundamental right to argue one side of the case includes the right to file pleadings:

> "The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. See Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 . . . " *Holt* v. *Virginia*, 381 U.S. 131, 136 (1965).

It follows that the right of a litigant to counsel and to all the elements of due process cannot be separated from but are dependent upon the extent to which they are recognized by the courts to reside in his lawyer, to whom the protection of a litigant's rights are necessarily delegated. Consequently, it is an attorney's duty not to omit to pursue a matter affecting his client's rights because of fear of offending the judge. Indeed, it is a lawyer's duty to assert claims on his client's behalf even at the risk of mistake or offense to the court.

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[6] *Cf.* Canons 4 and 5, Canons of Professional Ethics.

In *Caldwell* v. *U. S.*, 28 F.2d 684 (9th Cir. 1928), an attorney had been found guilty of contempt because he had rephrased a question which, in the opinion of the trial court, was immaterial to the proceedings. The trial judge had held that the attorney's purpose was to evade the court's ruling and that the questioning was "disorderly and obstructive."[7] Although the Court of Appeals found that the questioning at issue was in fact immaterial, counsel's good faith belief that it was not gave him the "right, if not [the] duty" to proceed. The court held that the "intent to be subordinate" must be "clear" if punishment for such questioning was not "to have the result of deterring an attorney of less courage and experience from doing his full duty to his client." *Ibid.*

Appellant here was not only under a moral and ethical obligation to represent his client competently without leaving matters to chance,[8] he also bore a profound constitutional responsibility. *Powell* v. *Alabama*, *supra*; *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). It will be a sad day in the long tradition of courageous representation by the bar if a lawyer can validly be held in contempt for filing papers which contain good faith allegations made on a client's behalf. In such event, lawyers will be deterred from fulfilling the admonition of the new Code of Professional Responsibility that a lawyer's "obligation to act compe-

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[7] *Newman* v. *U. S.*, 28 F.2d 681, 683 (9th Cir. 1928). *Newman* is the case out of which the contempt proceedings in *Caldwell* arose.

[8] "A lawyer should represent a client competently." Canon 6, Code of Professional Responsibility.

"Having undertaken representation a lawyer should use proper care to safeguard the interest of his client . . ." See. EC 6-4, Canon 6.

tently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty." Canon 6, EC 6-5. The Code's preamble recognizes that "Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimal standards." Appellant's motion demonstrated the "higher motivation" to which the Code would have lawyers aspire, and in its abundant use of statutory language, paid careful respect to the necessary proprieties. No more can be required of appellant under the law; no less was required of him by his ethical and constitutional duty to his client.

A. *Art. 222(3) punishes the exercise of expression protected by the First Amendment.*

Contempt proceedings often implicate First Amendment rights.

> "Since most disobedience which would constitute a contempt is involved in some act which might well come within the protection of the First Amendment, the possibilities of conflict are myriad. One can examine a contempt case, and the chances are high that it involves some form of speech when silence was appropriate, or silence when speech was demanded."[9]

Of the various purposes served by the First Amendment, none can be of greater importance than that served by a lawyer charged with advocating the cause of another in a court of law.[10] Limitations upon an attorney's speech in

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[9] Goldfarb, The Contempt Power 191 (Columbia Univ. Press 1963).

[10] "The decision which penalizes [an attorney] for . . . zeal sanctions censorship inside a courtroom where the ideals of freedom

the course of advocating his client's cause in court are justified only to protect the judicial process from actual disruption. It would be a perversion of the judicial process if attorneys, whose efforts are central to adversarial proceedings, could be punished for anything less.

Nonetheless, Art. 222(3) forbids any language of "irrelevant criticism" deemed "insulting, abusive, or discourteous." This language directly regulating speech has not been limited by the Supreme Court of Louisiana, as this Court has limited federal contempt laws, to apply to instances of "suppression . . . of court-disrupting misconduct," *In re Oliver*, 333 U.S. 257, 274 (1948), and to conduct or language which, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke* v. *United States*, 267 U.S. 517, 536 (1925). Article 222(3) clearly goes beyond the First Amendment and this Court's decisions.

In *Holt* v. *Virginia*, 381 U.S. 131 (1965), a case very much like the one at bar, this Court rejected the argument that the filing of a motion such as that at issue here could support a contempt conviction. The *Holt* motion for change of venue based on the judge's bias went much further than appellant's motion. The relevant sections of the *Holt* motion read as follows:

> "3. That the said Judge Carlton E. Holladay, who presided as Judge in said libel suit, and who fails and refuses to disqualify himself as Judge in the pending trial of the Defendant, E. A. Dawley, Jr., has

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of speech should flourish." *Fisher* v. *Pace*, 336 U.S. 155-166 (1949) (Douglas, J. dissenting). In another context, the Court has characterized litigation as "a form of political expression." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963).

with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.

"4. That in addition to the foregoing, said Judge Carlton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz., Leonard W. Holt, Esq., the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that said harassment and intimidation arises out of and is connected solely with said Leonard W. Holt's participating in the defense of said E. A. Dawley, Jr. in the contempt action; that part of said harassment and intimidation occurred at a hearing of this contempt action in the Hopewell Circuit Court on January 8, 1962, at which hearing the said Carlton E. Holladay revealed that he had been making an independent investigation and inquiry of Mr. Holt's conduct in this contempt defense, and said Judge at said place and time made the statement that he would 'deal with' said Leonard W. Holt after he, the judge, had dealt with said E. A. Dawley, Jr." 381 U.S. at 133.

The Court concluded, as it must here, that:

". . . [T]he words used in the motions were plain English, in no way offensive in themselves, and wholly appropriate to charge . . . bias of the presiding judge." 381 U.S. at 137.

Particularly relevant was this Court's holding regarding the view of the Supreme Court of Appeals of Virginia that Holt's motion was "insulting," since Art. 22(3) specifically employs that word. The Court recognized the ease with which *any* motion alleging judicial bias can be seen as "insulting" and concluded that:

> ". . . if the charges were 'insulting' it was inherent in the issue of bias raised, an issue which we have seen had to be raised, according to the charges, to escape the probability of a constitutionally unfair trial." 381 U.S. at 137.

The Court has consistently been sensitive to the way contempt proceedings can be used as an instrument of vindictiveness by a judge whose personal feelings have been aggrieved. For that reason it has held that such proceedings are to be reserved for instances of "obstruction and outrage" inasmuch as "[t]he power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged." *Offutt v. United States*, 348 U.S. 11, 14 (1954). The language of Art. 22(3) invites abuse at the hands of over-sensitive trial judges. It leaves to such a judge the determination whether counsel has been "insulting, abusive or discourteous," a subjective judgment which is notoriously unreliable.

One commentator has noted that the "law of contempt is not the law of men, it is the law of kings. It is not law which representative legislators responsibly reflecting the *vox populi* originally wrote, but is rather derived from the divine law of kings . . ." The awesome power of contempt must therefore be

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[11] Goldfarb, *op. cit.* at 11.

> "seen through the perspectives of its age of inception, an age of alleged divinely ordained monarchies, ruled by a king totally invested with all sovereign legal powers and accountable only to God. Under any circumstances resistance to the king was a sin which would bring damnation."[1]

Considering this history, the inherent characteristics of contempt, and the view that "the contempt power is a potential instrument of oppression," *Green v. United States*, 356 U.S. 165, 188 (1958), Art. 222(3) must be held to violate the First Amendment on its face.

If not unconstitutional on its face, Art. 222(3) is surely unconstitutional as applied in this case, for it permitted appellant to be held in contempt for filing a motion which only utilized the words of another Louisiana statute.[2] Judged by tradition and case law, appellant's words fall far short of expression that has been barred from the courtroom.

The British practice involving contempt, from which American rules were derived, properly allowed for wide latitude of speech and expression by counsel:

> "An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any

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[1] Goldfarb, *op. cit.* at 11-12.

[2] Art. IX, Sec. 1, Louisiana Constitution which provides:
"All state and district officers, whether elected or appointed, shall be liable to impeachment for high crimes and misdemeanors in office, incompetency, *corruption, favoritism*, extortion, or *oppression* in office, or for gross misconduct, or habitual drunkenness."

> adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case."[14]

American jurisprudence, never comfortable with the attempt because of the hostility of due process to summary proceedings,[15] has given substantial protection to an attorney's right to free expression in court proceedings. In *Holt* v. *Virginia*, *supra* at 136, this Court implied that expression in the courtroom might not be punished unless a participant is found to have done such acts as "disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties."

In re McConnell, 370 U.S. 230 (1962), involved a situation well beyond that at issue here. The attorney, in ob-

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[14] Oswald, Contempt of Court (3rd edition), at 56-57.

[15] "It is abhorrent to Anglo-Saxon justice as applied in this country that one man, however lofty his station or venerated his vestments, should have the power of taking another man's liberty from him. Society has always permitted one exception—the limited power of courts to punish for contempts. But that exception has been grudgingly granted, and has been held down uniformly to 'the . . . least possible power adequate' to the end proposed." *Ballantyne* v. *U. S.*, 237 F.2d 657, 666-667 (5th Cir. 1956).

jecting to the court's instruction that he not continue with questions that had been ruled inadmissible, was cited for contempt for the following statement:

> "We have a right to ask questions which we offer on this issue and Your Honor can sustain their objection to them. *We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.*" (Emphasis in the original.) 370 U.S. at 235.

The Court held that an attorney could not be punished for a statement in court absent actual obstruction of justice:

> "It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that 'we propose to do so unless some bailiff stops us.' The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a *mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice* that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts. The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." (Emphasis added.)

United States v. *Sopher*, 347 F.2d 415 (7th Cir. 1965), reversed the contempt conviction of an attorney whose closing argument to the jury was found improper. Even though the attorney "as a member of the bar . . . owed the court a more careful appraisal of the record . . . before advancing the argument he attempted," the court said, "his failure in this respect is too tenuous a basis to support a finding of contempt." 347 F.2d at 418. Adopting the strict standard characteristic of contempt cases, the court was impressed that, "it was not clearly shown that appellant's conduct, although unjustifiable, actually obstructed the District Judge in the performance of judicial activity." *Ibid.*

These cases involving speech by counsel, though far more serious than appellant's, did not sustain contempt convictions. Cases involving motions demonstrate the same result.[16] All these cases give considerable latitude to the

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[16] See, for example, *Woolley* v. *Superior Court*, 19 Cal. App. 2d 611, 66 P.2d 680 (1937) (motion for disqualification alleged that judge had indicated his belief in defendant's guilt during the course of the trial and that he participated at trial in order to obtain evidence favorable to the plaintiff's); *Walker* v. *People*, 126 Colo. 135, 248 P.2d 287 (1952) (motion for disqualification alleged that judge "has previously expressed and exhibited a determination to bring about a conviction, and if possible, the execution of the petitioner, regardless of the law or facts. . . ."); *Blankenbaker* v. *State*, 201 Ind. 142, 166 N.E. 265 (1929) (motion for disqualification alleged that judge announced to the jury "that he knew enough of the record to send defendant to the electric chair"); *Callahan* v. *Callahan*, 30 Idaho 431, 165 P. 1122 (1917) (motion for change of venue alleged that opposing party's friendship and influence with judge made fair trial impossible); *State* v. *Simon*, 154 La. 73, 97 So. 302 (1923) (motion for disqualification alleged that the judge had instigated the prosecution "as a last and desperate attempt to punish the accused for not supporting him in the last preceding election"); *State ex rel. Moore* v. *District Court*, 116 Mont. 305, 151 P.2d 1002 (1944) (litigant moved for disqualification on ground that the "Court has been charged with

framing of pleadings of bias, to argument, and to questions, and must be read as vindicating the right to free expression in court proceedings.

It would indeed be anomalous if this Court were to adopt an unduly restrictive First Amendment rule for courts while insuring its broadest reach elsewhere. *See Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *United States* v. *Robel*, 389 U.S. 258 (1967); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Something of the rationale of the out-of-court contempt cases is surely appropriate for the courtroom. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).[17] Indeed

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stealing a receipt for $3000 which I trusted them with . . . ."); *Le Hane* v. *State*, 48 Neb. 105, 66 N.W. 1017 (1896) (affidavit of prejudice alleged that judge silently concurred in his son's threat to prevent affiant from practicing law because of a political dispute); *Ponder* v. *Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951) (motion for disqualification alleged that judge took an active part in opposing party's political campaign and that "the great majority of the people . . . regardless of the decision of the court . . . would feel that political considerations were the determining factor"); *State* v. *Brown*, 8 Okla. Crim. 40, 126 P. 245 (1912) (prosecution charged that judge "did at various and sundry times have private and secret consultations relative to and pertaining to the merits of the case" with the defendant); *Commonwealth* v. *Sheasley*, 102 Pa. Super. 384, 157 A. 27 (1931) (motion for disqualification charged judge with cooperating with opposing counsel to defeat petitioner's cause).

[17] "[T]he actual interference with the administration of justice by an individual would, in most cases, be less than that of the ubiquitous and powerful press, [but] the individual's greater susceptibility to contempt conviction is indicated by the decisions. Possibly this is explained by the fact that so many cases of contempt by individuals arise out of special incidents involving affronts to judges. Though the wrong to society in such a case is unques-

this Court has applied the same test for judging both in-court and out-of-court contempt—interference with the administration of justice. See, e.g., *Pennekamp* v. *Florida*, *supra* at 347. If the First Amendment bars "shielding judges from published criticism," *Bridges* v. *California*, *supra* at 270, originating outside the courts; it cannot seriously be argued that the "criticism" inherent in a motion for recusation filed to protect a litigant's rights in court is contemptuous. The Court in *Bridges* said that "enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.* at 270-271. This view is as applicable to courtroom proceedings where "enforced silence" would put in jeopardy the constitutional rights of litigants.

If Art. 222(3) is applied to sustain the conviction in this case, it will herald the exclusion of the First Amendment from the courtroom. This Court's decisions point the opposite way. It should be made explicit that, both inside and outside the courtroom, "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice," *Pennekamp* v. *Florida*, *supra* at 347.

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tionably less than the situation where the press actively invades a trial, the result in terms of responsibility is often opposite. There is a danger that these convictions realistically may be more a result of governmental power being exercised for personal and emotional reasons than a desire to foster the efficient administration of justice." Goldfarb, *op. cit.* at 192-193.

B. *Art. 222 § violates the First and Fourteenth Amendments because it is vague and overbroad.*

Art. 222(3) was first enacted in 1950. In neither this nor in any previous case has the Louisiana Supreme Court limited its language. Thus this case is unlike *Garner v. Louisiana*, 368 U.S. 157 (1961), in which the Court had before it an authoritative decision of the Supreme Court of Louisiana found to exclude the behavior at issue. There can be no doubt that the Louisiana Supreme Court has given its approval to an overly broad statute punishing speech described in the vague language of "insulting," "abusive," "discourteous" and "irrelevant."

A contempt statute regulating speech must of course meet the same requirements of narrowness as other statutes affecting speech. But such a statute bears an additional burden because of the summary nature of the proceedings authorized to enforce it.

> "[T]he grant of summary contempt power . . . is to be strictly construed so that the instances where there is no right to a jury trial will be narrowly restricted to the historic cases where concession of this drastic power to the courts is necessary to enable them to preserve . . . authority . . . order . . . decorum." *Farese v. [illegible]*, [illegible] F.2d 312, 315 (1st Cir. 1954).

Art. 222(3) does not meet the minimum requirements of narrowness in cases of contempt proceedings nor those required of a statute touching the First Amendment area and is clearly overbroad.

> *[illegible] v. [illegible]*, 244 La. 604, 181 So.2d 41 (1965).
>
> *[illegible] v. [illegible]*, 201 La. 961, 14 So.2d 778 (1943).

This Court has said of vagueness that if "words and phrases are vague and indefinite . . . any penalty prescribed for their violation constitutes a denial of due process of law." *Champlain Ref. Co. v. Corporation Comm.*, 286 U.S. 210, 243 (1932). See *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

Looking to the specific language of Art. 222(3), it is clear first that the statute is void for vagueness because it fails to give fair warning of the prohibited conduct or afford an adequate standard of guilt. *International Harvester of America v. Kentucky*, 234 U.S. 216 (1914). An attorney with a claim to press on behalf of a client must wonder at what the court will consider "insulting," "abusive" or "discourteous." And despite the usual uncertainty surrounding questions of relevance and irrelevance at trial, he must be concerned that whatever the judge deems "irrelevant criticism" may be held to be contemptuous. Such words lend themselves more to abuse than to definition. They are in the same category as language such as "unreasonable," *Cline v. Frink Dairy Co., supra*, and "sacrilegious," *Burstyn v. Wilson*, 343 U.S. 495 (1954), held unconstitutionally vague by this Court.

"The vice of unconstitutional vagueness is further aggravated where as here the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961). A statute addressed to behavior that may be regulated must nevertheless be drawn so as to avoid overbreadth which risks the inclusion of First Amendment activity in what is barred:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The rule against overbreadth takes cognizance of the ease with which protected expression can be stifled through the use of statutes which may at first appear to do no more than exercise lawful power. This special rule in the First Amendment area has evolved out of this Court's recognition that "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *United States* v. *Robel*, *supra*.

To avoid overbreadth, a contempt statute must be limited to words which are in fact disruptive of judicial proceedings, or else protected words may also be punished. But under Art. 222(3), as drawn and interpreted, *all* "insulting, abusive, or discourteous language of irrelevant criticism" is contemptuous, even if it in no way interferes with or disrupts the proceedings.

This Court has avoided the problem of overbreadth in contempt statutes by limiting the contempt power to situations of actual "obstruction of judicial duty," *Ex parte Hudgins*, 249 U.S. 378, 383 (1919), finding that,

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted . . . "

This Court has left no doubt as to the continuing vitality of the "actual obstruction" test. Reversing the contempt conviction of a lawyer in *In re McConnell, supra* at 236, this Court said:

> "The argument of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in performance of his judicial duty. The petitioner created no such obstacle here.
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom . . . it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice."

Indeed, Sections (1) and (2) of Art. 222,[20] although they deal with "behavior" and "conduct" rather than with the

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[20] "Any of the following acts constitutes a direct contempt of court:

"(1) Contumacious, insolent, or disorderly behavior toward the judge, or an attorney or other officer of the court, *tend-*

more specific categories of speech are never limited than Sec. (3) which deals only with expression. Sections (1) and (2) are at least in part specifically limited by the words "tending to interrupt or interfere with the business of the court," language connoting partial observance of the required standard. But even this minimal limitation is dropped from Sec. (3) relating to verbal speech and written documents, thereby resulting in greater protection for conduct than for words, the category of expression which enjoys the greatest protection of the First Amendment. Instead Art. 2(3) is defined by vague words reflecting the most subjective connotations: "insulting," "abusive," "disrespectful," and "irrelevant criticism." Such words and "phrases of inherent discretion" cannot regulate the expression of an attorney, who owes his highest duty to ethical and constitutional considerations.

Moreover, Art. 2(3) is overbroad in that it can indiscriminately reach intentional and unintentional conduct. But scienter cannot be found where:

> "Positive evidence of a deliberate intent to pursue a course of improper argument or prohibited conduct is absent." *United States v. Sophie*, 347 F.2d 413 (7th Cir. 1965).

> ... to interrupt or interfere with the business of the court, or to impair its dignity or respect for its authority ... Breach of the peace, boisterous conduct or other disturbance tending to interrupt or interfere with the due business of the court, or to impair its dignity or respect for its authority." Emphasis added.

Accordingly, "The Void for Vagueness" doctrine in the Supreme Court, [illegible]

See also *[illegible]*

States v. *Thompson*

v. *United States*

111 F.2d 925 (

(9th Cir. 1939).

A comparison between the federal contempt statute, 18 U.S.C. § 401, and Art. [illegible] further demonstrates the vagueness and overbreadth of the legislation.

Section 401 provides that

> "A court of the United States shall have power to punish by fine or imprisonment, [illegible] contempt of its authority, and none other, as

> (1) Misbehavior of any person in its presence so near thereto as to obstruct the administration of justice;

> [illegible]"

Thus, by its terms, Section 401(1) limits contempt to misconduct which obstructs the administration of justice. The statute has made clear that this court's jurisdiction is not a matter of legislative grace but is compelled. *In re* [illegible] limitation of contempt to misconduct of such a nature as to

> "a Congressional intent to [illegible] exclusive jurisdiction [illegible] power [illegible] federal [illegible]

for the [illegible]

> this, we have said: 'would permit too great inroads on the procedural safeguards of the *Bill of Rights*, since contempts are summary in their nature and leave determination of guilt to judges rather than a jury.'" (Emphasis added.) *Ibid.*

See also *In re Michael*, 326 U.S. 224, 227 (1945); *Nye v. United States*, 313 U.S. 33, 44-48 (1941). Since Art. 222(3) does not expressly limit contempt to obstruction of justice the article cannot stand unless limited by judicial decision. The Louisiana Supreme Court has declined to so limit its statute.

Infected with both vagueness and overbreadth, Art. 222(3) discourages vigorous advocacy by attorneys. Considering especially the treatment of this case by the Louisiana courts, Art. 222(3) stands as a dangerous deterrent to fearless speech where it is most needed because it is "too incomprehensible . . . too approximative . . . too discretion-giving" and because it "injects into the governmental wheel so much free play that in the practical course . . . it is likely to function erratically—responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society."[10]

Instead of a statute narrowly drawn to encompass only truly contemptuous conduct, Art. 222(3) by its terms and

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[9] Compare decisions of this Court limiting statutory language to save its constitutionality. *Stevens v. United States*, 325 U.S. 91 (1945); *United States v. Harriss*, 347 U.S. 612 (1954).

[10] Amsterdam, *supra* at 90.

as interpreted in this case strays beyond the legitimate boundary of contemptuous behavior and intrudes upon the perimeter of decorous pleading. Louisiana, like the Congress in *United States* v. *Robel*, *supra*, was free to regulate unprotected behavior. It is unlikely that this Court would tolerate broader language in a contempt statute than in a statute affecting national security as in *Robel* (389 U.S. at 267-268):

> . . . Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms. *Shelton* v. *Tucker*, *supra*, cf. *United States* v. *Brown*, 381 U.S. 437, 461.

Louisiana, like Congress, must draft and interpret its contempt statute narrowly if it is to meet constitutional standards. It has failed altogether to do so here.

II.

Appellant was denied due process of law because the record is barren of any evidence to support his conviction.

A state conviction unsupported by any evidence violates the due process clause of the Fourteenth Amendment. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, *supra*; *Barr* v. *City of Columbia*, 378 U.S. 146 (1963); *Johnson* v. *Florida*, 391 U.S. 596 (1968). The record in this case is barren of any evidence.

The only evidence in the record of this case is appellant's motion to recuse. In pertinent part it reads as follows:

> "The plaintiff herein, Lewis P. Hopkins, Jr., and his chief witness in this case, Mr. Charles Anderson, III, are presently engaged in the process of attempting to have Judge Dixon removed from office as being unfit therefor by virtue of *corruption, favoritism, oppression* and malfeasance in office."

The italicized words are taken directly from the Louisiana constitutional provision establishing the criteria for impeachment of elected or appointed state officers, including judges. That provision, Art. IX, Sec. 1 of the Louisiana Constitution, reads as follows:

> "All state and district officers, whether elected or appointed, shall be liable to impeachment for high crimes and misdemeanors in office, incompetency, *corruption, favoritism*, extortion, or *oppression* in office, or for gross misconduct, or habitual drunkenness."

The words in the motion are not appellant's characterization of the judge. As written, the motion asserts that appellant's client was attempting to have Judge Dixon impeached for the reasons set out in Art. IX, Sec. 1. Assuming the truth of that assertion (and there is nothing in the record to establish either its truth or falsity), appellant surely had a duty to file the motion to recuse Judge Dixon who may have heard of the plaintiff's efforts to impeach him and would, understandably, therefor, be biased against him. That, of course, was the basis for the conclusory allegation in the motion which asserted that Judge Dixon was "therefore interested in the cause." The latter language, too, is statutory. They are the words used in Art. 15[illegible] which sets out the grounds for recusal:

> "'A judge of any court, trial or appellate, may be recused when he [illegible] (5) is interested in the cause."

Thus appellant alleged only what was factually necessary: the statutorily endorsed proceedings against the judge in which his client was engaged, and his belief that the judge was "therefore interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward plaintiff in that he would be unable to give a fair trial in this matter." Surely such language alleging bias does not go "beyond what is necessary, where [the facts] involve the judicial acts or character of the judge." *Hughes v. People*, 3 Colo. 430, 431 (1880). And

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In drawing a motion for recusation the basis of the alleged interest must be stated. In *State v. Bienvenu*, 124 La. 302, 50 So. 13 (1909), the Louisiana Supreme Court said: "Where a motion assigns no legal grounds for recusation it must be overruled without reference to another judge." *State v. Calhoun*, 124 La. [illegible] 78, 7 So. 501. See also *Strawbridge v. Pittsburgh*, 230 La. 1, 87 So. 162 (1942).

the attempt of the Attorney General of Louisiana to rewrite the motion as he believes it should have been presented is not only an intolerable intrusion on an attorney's right to express himself freely within the bounds of propriety, but might have proved legally deficient in failing to specify that bias flowed from the judge's interest.[20]

Thus, assuming the validity of Art. 222(3), there is no evidence here of its violation by appellant. Even if Judge Dixon thought the language in the motion was "insulting, abusive or discourteous," appellant could not be convicted for asserting the fact that his client was attempting to have the judge impeached for reasons set out in the Louisiana Constitution and for asserting the inference to be drawn from that fact, namely, that the judge might therefore be biased. There is no evidence that appellant himself was "insulting, abusive or discourteous" in manner when he submitted the motion to recuse, nor is there any evidence that he was "insulting, abusive or discourteous" by virtue of his stating to the judge that he, the appellant, believed the judge guilty of "corruption, favoritism, oppression and malfeasance in office."

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[20] The Attorney General's "motion" would have assumed rather than alleged bias: "(a) Mr. Spencer's clients were attempting to remove Judge Dixon from office, (b) Judge Dixon was aware of the circumstances, (c) being apprised of the fact, Judge Dixon should be recused." Brief on Behalf of Respondent Trial Judge in Support of Motion to Dismiss or Alternatively Affirm, p. 15.

CONCLUSION

For the reasons stated above, the conviction should be reversed.

Respectfully submitted,

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March 19, 1970

APPENDIX

Motion and Order for Recusation

Now Into Court, through undersigned counsel, comes Lewis P. Hopkins, Jr., plaintiff in the above captioned matter, who with respect represents:

1.

That the instant proceeding is an uncontested suit for separation from bed and board based upon abandonment.

2.

A preliminary default was entered herein on January 5, 1968.

3.

That on March 20, 1968, the instant proceeding was brought before the Court for confirmation of default and despite overwhelming evidence of the abandonment of petitioner by defendant, the trial judge, Honorable John A. Dixon, Jr., dismissed plaintiff's suit giving as the oral reasons therefor that the plaintiff had not proven a case of abandonment.

4.

The plaintiff herein, Lewis P. Hopkins, Jr., and his chief witness in this case, Mr. Charles Anderson, III, are presently engaged in the process of attempting to have Judge Dixon removed from office as being unfit therefor by virtue of corruption, favoritism, oppression and misfeasance in office.

5.

Plaintiff alleges, on information and belief, that Judge Dixon, First Judicial District Court for Caddo Parish, Louisiana, is therefore interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward plaintiff in that he would be unable to give a fair trial in this matter.

6.

Plaintiff has applied for a new trial limited to rehearing in this matter and alleges, on information and belief, that for the reasons set out hereinabove, the Honorable John A. Dixon, Jr., would be unable or unwilling to give a fair and impartial rehearing in this matter.

7.

Plaintiff alleges, on information and belief, that Judge John A. Dixon, Jr., First Judicial District Court for the Parish of Caddo, is interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward counsel for plaintiff that he was unable or unwilling to give a fair trial in this matter.

8.

Although counsel for plaintiff was aware of animosity on the part of the trial judge herein prior to the attempted confirmation of default, he was not aware, and the plaintiff was not aware, that the aforesaid animosity, bias, prejudice and interest would prevent a fair trial in this matter.

WHEREFORE, plaintiff respectfully prays that the Honorable John A. Dixon, Jr. recuse himself in this cause or refer this motion to another judge or a judge ad hoc for a hearing in accordance with Article 155 of the Louisiana Code of Civil Procedure and the rules of the First Judicial District Court.

/s/ DAN A. SPENCER
Suite 7, Dixie Building
1639 Kings Highway
Shreveport, Louisiana
Attorney for Plaintiff

SUPREME COURT, U. S.

Number 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter

of

DAN A. SPENCER

On Appeal from the Supreme Court
of the State of Louisiana

BRIEF ON BEHALF OF RESPONDENT TRIAL JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 513

IN THE MATTER OF DAN A. SPENCER

On Appeal From the Supreme Court of the State of Louisiana

BRIEF FOR RESPONDENT

STATUTORY PROVISIONS INVOLVED

Louisiana Code of Civil Procedure

Art. 221. Kinds of contempt

A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice or to impair the dignity of the court or respect for its authority.

Contempt of court is of two kinds, direct and constructive.

Art. 222. Direct contempt

A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge, or a continuation of failure to comply with

"2. Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance * * * The case will then be placed on the appellate docket."

Even if the documents of appellant could be considered as an attempted appeal from the First Judicial District Court, jurisdiction has never been completed. Appellant has not lodged the record here. Respondent, Judge Williams, has filed the district court record with this Court in support of his motion to dismiss. The sole purpose of this filing was that this Court could have before it the complete record for determination of jurisdiction. Appellant, in his brief, has referred extensively to the items from the district court record not filed by him. This case, if reached on its merits, should not be decided on the deficient record filed by appellant.

C. Appeal Presents No Substantial Constitutional Question

At issue in this case is the right of the State of Louisiana legislatively to grant courts the control over pleading content within the narrow limits specified in the legislation. Appellant has attacked this legislation as being constitutionally defective on its face in violation of First Amendment free speech rights and being constitutionally defective as applied to appellant, in violation of Fourteenth Amendment rights.[7]

[7] Brief of appellant, page 2. The statute attacked is Art. 222 of the Louisiana Code of Civil Procedure. Mr. Spencer's pleading was found contemptuous under the definition of direct contempt of Art. 222. The proceedings against him, however, were *not* summary, as authorized by Art. 223. Art. 224 defines constructive (indirect) contempts. Art. 225 establishes the more protective procedure for this contempt. These proceedings were tried under Art. 225, affording all constitutional safeguards for minor offenses. *Constitutional authority to punish summarily direct contempts is not an issue in this case.* Articles 222 and 225 are reproduced in full, pp. 1-3, *supra*.

After being cited for contempt, Mr. Spencer, on March 28, 1968, instituted an action in the United States District Court for the Western District of Louisiana.[8] In that action, appellant sought to enjoin further state court proceedings under the contempt rule. Attacking the constitutionality of Articles 221 *et seq.*, he obtained the convocation of a three-judge court. His constitutional attack there made was the same attack made here.[9] A temporary restraining order issued. Considering these issues raised by appellant, the three-judge court decided "that no substantial constitutional question is presented; and that the case was not appropriate for a decision by a three-judge court under 28 U. S. C. §2281", and dissolved itself. The matter was returned to the single judge for appropriate disposition.[10] After a hearing on August 16, 1968, on the motion of Judge Dixon for a summary judgment, the summary judgment was granted and Mr. Spencer's petition dismissed. Each issue now raised by appellant was raised by him in this prior federal proceeding and painstakingly decided by the District Judge.[11] After rendition of the judgment of the Federal District Court (opinion dated September 30, 1968), an appeal was taken by Mr. Spencer to the Fifth Circuit Court of Appeals. While this appeal was pending, the state proceedings were

8 Reported as Spencer v. Dixon, 290 F. Supp. 531 (1968).

9 "In addition to the foregoing, complainant alleged that Articles 221, *et seq.*, of the Louisiana Code of Civil Procedure are unconstitutional, both on their face and as attempted to be applied to complainant. He asserted that these Articles are unconstitutional on their face in that they are an overly-broad restriction of freedom of speech guaranteed him by the Constitution of the United States through the First and Fourteenth Amendments. He further asserted " " " [that] these Articles are unconstitutionally applied against complainant in that they limit his right of free speech to make a truthful charge in a pleading against a judge." 290 F. Supp. 532, 533.

10 290 F. Supp. 535.

11 See Opinion 290 F. Supp. 531.

voluntarily held in abeyance by Judge Williams. Thereafter, pursuant to a motion filed by Mr. Spencer for dismissal, an order was issued by the United States Court of Appeals for the Fifth Circuit dismissing the appeal.[12]

Mr. Spencer chose, as was his right, to litigate these issues by injunctive process before the lower federal courts. He lost. He appealed. He voluntarily dismissed his appeal. This action speaks loudly of the insubstantiality of the purported constitutional issues. Appellant has been afforded ample federal forum for presentation of each issue now sought to be adjudicated. Having voluntarily dismissed his constitutional attack on one occasion, he should not now again be allowed to revive it in the federal system. For the reasons expressed in Parts II and III of this brief, we suggest that Mr. Spencer's dismissal of his appeal was appropriate. The constitutional issues are insubstantial.

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12 Proceeding No. 27290 U. S. Court of Appeals for the 5th Circuit. Order issued March 17, 1969.

II.

CONSTITUTIONALITY OF ARTICLE 222

Louisiana, by legislation,[13] directs courts to control pleading content to the end that insulting, abusive or discourteous language of an attorney irrelevantly directed to a judge, or contumacious or insolent behavior tending to impair the dignity or respect of a court be proscribed. This conduct is made contumacious by definition. This is the conduct for which Mr. Spencer was cited for contempt. He filed a pleading, as attorney, accusing the trial judge of "corruption, favoritism, oppression, and misfeasance in office". As applied to him, Mr. Spencer seeks to have Article 222 of the Louisiana Code of Civil Procedure declared unconstitutional as violative of First Amendment free speech rights. We deal here with a narrow aspect of the contempt subject: control over pleading content. The Louisiana statute is attacked as being an abridgment of free speech, restricting a lawyer's duty for effective advocacy, and as infected with over-breadth. Because the conduct is punishable by summary proceedings, appellant claims, the statute fails to meet the "strictest standard of constitutionality".[14]

A review of the development and policy therefor of contempt jurisdiction concerning the duty of courts to control abusive language of counsel impairing the dignity and respect for authority, we submit, answers the constitutional question.

---

13 Louisiana Code of Civil Procedure, Arts. 221 *et seq.*, Louisiana Code of Criminal Procedure, Arts. 20 *et seq.*

14 Brief of appellant, pages 7, 8. Mr. Spencer was not tried or punished by the "summary" procedure available for direct contempts. He was afforded all constitutional rights he claims summary procedure infringes. See pp. 20-22, *infra*.

It is suggested[15] that contempt authority is an anachronistic historical generalization of the protection of kings against criticism by their subjects, adopted by the judiciary for the insulation of judges. Illegitimate conception, it is argued, renders all contempt constitutionally suspect. Whether Blackstone's oft-repeated declaration[16] be dogma or dicta,[17] Louisiana, in keeping with her civilian tradition,[18] has since earliest times made statutory the authority of courts to cite for contempt. It has defined contempt by statute.[19] By mandate of

15 Brief of appellant, pages 15 & 16. Goldfarb, The Contempt Power, Chapter I (Columbia University Press, 1963).

16 "Some of these contempts may arise in the face of the court; as by rude and contumacious behavior, by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever.

* * * *

"The process of attachment for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an incident inseparably attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." 4 Blackstone, Commentaries on the Laws of England, p. 285 (15th Ed., A. Strahan, printer, 1809).

17 See *Bloom v. Illinois*, 391 U. S. 194, 198, 20 L. Ed. 2d 522, 527; 88 S. Ct. 1477.

18 Louisiana Revised Civil Code, Article 1: "Law is a solemn expression of legislative will."

19 Louisiana Code of Practice of 1825, Articles 131, 132; statute of March 27, 1925, Louisiana General Session Laws; Louisiana Revised Statutes of 1870, § 329. Substantially, the earliest legislative enactment concerning contempt was contained in the 17th section of the Act of 1805, chapter 26, 2 Martin's Digest 326. (This was the Louisiana Practice Act of 1805, which its author, Edward Livingston, immodestly boasted, inaugurated a system of procedure "so simple and free from useless forms that a student in his office had only to achieve a complete mastery of it in the space of seven hours." 1 McMahon, Louisiana Practice iii.) This Act (before statehood) gave the superior courts of the territory of Orleans power to punish contempts. The 19th section of the first judicial act of 1813 repealed these provisions giving the superior courts authority "to punish all contempts by fine not exceeding $50 for each offense, and also by imprisonment not exceeding 10 days." Prior to the adoption of the Code of Practice and the Civil Code of 1825, many of the laws of Spain were still in force in Louisiana. During the period from the date of the Louisiana Purchase to 1825, the substantive laws of contempt concerning attorneys and judges was contained in *Las Siete Partidas*, third

continued

her Constitution,[20] the legislature is directed to specify the contempt power of courts. Pursuant to this mandate, the questioned statute,[21] and a similar statute concerning contempt before the criminal courts of the state[22] were adopted on recent revision of the codes of civil and criminal procedure.

The historical analysis of the development of contempt made by Goldfarb[23] concludes that of civilized nations only the Anglo-American legal system has reposed in its judiciary broad summary contempt power. Goldfarb, however, admits one exception, that being of criminal contempts directed to punishment for past acts.[24] This is the lone type of contempt with which this case deals. Louisiana, while cognizant of the common law development of contempt and of the writings of Blackstone, founds its contempt authority on the civilian con-

continued

Partida which forbade judges to suffer the arrogant and indecorous language of lawyers. Judges were directed to demean themselves that their authority may not be contempted. Contempt by any lawyer toward the court, by expression or gesture, could be instantly punished, at least by suspension from practice. See *De Armas' Case*, 10 Martin (O. S.) 158 (Eastern District July term 1821). This is probably the oldest Louisiana case concerning contempt, and curiously is similar in many respects to the instant case. In this case (as reported in 10 Martin [O. S.] 123) an attorney made indecorous expressions directed to the court in a written application for rehearing. On having his attention invited to his intemperate language, he declined to amend his application. An order was entered that he answer for contempt. On appearing, "in his attempt at a justification, forgot himself so far as to suggest that the court were disposed to punish him, as the author of some publications, in which he had denounced, in the *Ami desloix*, their declaration made in May last." These writings apparently accused the court of evil disposition toward those portions of the citizenry "whose vernacular was not the English". Compare these actions with Mr. Spencer's here, and with his past performance before the Louisiana Supreme Court in the unrelated matter of *Spencer v. Dixon*, 181 So. 2d 41, 248 La. 604 (La. S. Ct. 1965).

20 Constitution of the State of Louisiana, 1921, Article 19, Section 17: "The power of the courts to punish for contempt shall be limited by law."

21 Article 222 of the Louisiana Code of Civil Procedure.

22 Article 20 *et seq.* of the Louisiana Code of Criminal Procedure.

23 Goldfarb, The Contempt Power, Chapter 1 (Columbia University Press, 1963).

24 *Ibid.* p. 2.

cept. In Louisiana, contempt was not judge-made for protection of the sensibilities of judges. Contempt authority was legislated by the first legislative body of the territory of Orleans. It is through this legislation, not through an "inherent power" that Louisiana courts are granted contempt authority. It was the execution of the legislative mandate that justice should be orderly administered by courts, unfettered by contumacious conduct of counsel, that this contempt citation issued. It was not a protection of the sensibilities of the individual occupying the office of judge. Although the source of authority is different in Louisiana from common law jurisdictions, the policy behind the authority is the same and was well stated by the Supreme Court of Nebraska as:

> "* * * There is no possible disposition to question the right of any and every person to criticize the action of the court or its judges; but if the officers of the court, as attorneys, are permitted to assail the judges by briefs or other papers filed in and made a part of the records of the court, and thereby seek by questionable and unfair means to destroy the respect which is and should be entertained for the court as the highest judicial tribunal in the state, it would not be long until all respect for it would, and probably should, be lost. There is a well-recognized duty imposed upon the judge or judges to see that the respect and integrity of the courts are maintained, and, unpleasant as it may be, we cannot evade or flinch from the discharge of that duty."[25]

Louisiana has historically reprobated abusive language of counsel either in argument or pleading content as being a threat to the authority and dignity of its judiciary. The exer-

25 *Re Dunn*, 85 Neb. 606, 124 NW 120 (1909).

cise of this power has not had as its motive or result the suppression of criticism.[26]

Within the federal system, the Judiciary Act of 1789 gave federal courts "the power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before same."[27]

This Court has since earliest times assumed the inherent jurisdiction in the federal system for contempt, stating in 1812:

> "Certain implied powers must necessarily result to our courts of justice from the nature of their institution. * * * To fine for contempt, imprison for contumacy, inforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; * * * "[28]

In 1821, this Court had occasion for the first time to consider the contempt authority of Congress. In passing on Congress' contempt power, Justice Johnson stated in clear terms the contempt authority of the federal courts and the reason for that authority:

> "But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is

26 *De Armas' Case*, 10 Martin (O. S.) 158 (1821); *State v. Soule*, 8 Robinson 500 (1844); *State v. Keene*, 11 La. 596 (1837); *Lanoix et al v. Home Indemnity Co. of New York*, 204 La. 1044, 16 So. 2d 834.

27 Judiciary Act of 1789, Section 17, 1 Stat. 83.

28 *U. S. v. Hudson*, 11 U. S. (7 Cranch) 32, 34, 3 L. Ed. 259, 260.

a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. * * * The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

"That 'the safety of the people is the supreme law', not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution."[29]

An analysis of the development of contempt in this country to that time (1880) was recited by this court in *Ex Parte Terry*.[30] This court stated:

"But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether as-

29 *Anderson v. Dunn*, 19 U. S. (6 Wheaton) 204, 226, 227, 5 L. Ed. 242, 247, 248. This case, insofar as it held Congress inherently empowered to issue and punish for contempt, was overruled in *Kilbourn v. Thompson*, 103 U. S. (13 Otto) 168, 26 L. Ed. 377 (1880). Despite the fact that *Anderson* was overruled as to its holding concerning Congressional contempt authority, the declaration in the opinion of the judicial authority for contempt has subsequently been cited with approval by this court (*Ex parte Terry*, f. n. 30). The reason and extent of that authority as to courts is as valid now as then. Also appropriate is the advice given by Justice Johnson to the would-be contemptor who complains of the inconvenience of contempt authority: "If the inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical." 5 L. Ed. 249.

30 128 U. S. 289, 32 L. Ed. 405, 9 S. Ct. 77 (1888).

> sailed by the illegal acts of the Government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.' "[31]

These statements reflect the historical assumption that our courts have a constitutional right to exercise contempt authority for the purpose of imposing respect and decorum in the presence of the court and to punish those contempts which imply a purpose to impair its authority or to obstruct its business.

In 1949, this Court had before it *Fisher v. Pace*,[32] a contempt matter dealing with the right of an attorney to comment in the course of a trial. For conduct which was mild in comparison to Mr. Spencer's, Mr. Fisher was summarily punished for contempt[33] as a result of a colloquy between the Court and counsel. After affirmation by the Supreme Court of Texas, the case came to this Court by certiorari. The conviction for contempt was sustained by this Court against an attack that the conviction violated Fourteenth Amendment rights of Mr. Fisher. The dissent of Justice Douglas, concurred with by Justice Black, focused disagreement with the majority on

31 128 U. S. 307, 32 L. Ed. 410.
32 336 U. S. 155, 93 L. Ed. 569, 69 St. Ct. 425.
33 The report does not indicate that Texas had a statute defining contempt.

free speech rights.[34] Although neither the majority opinion nor the dissents of Justices Murphy or Rutledge specifically discuss free speech, we assume that the majority opinion answered the dissent's free speech argument with the following language:

> "The conduct of a judge should be such as to command respect for himself as well as for his office. We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly the last few sentences of the altercation."[35]

In 1968, this Court in *Bloom v. Illinois*,[36] chronicled and expanded constitutional curbs against abuse of contempt authority. *Bloom* is of special significance here, for it carefully lays down constitutional standards against which this attacked contempt statute may be measured. These standards, as repeated or expanded in that opinion, are:

> 1) Careful distinction is drawn between direct and indirect contempts (those committed in the presence of the court and those committed outside its presence). Indirect contempts require adversary proceedings. Direct contempts may be disposed of without hearing or evidence.[37] The Louisiana Code of Civil Procedure

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34 "I do not think freedom of speech should be so readily sacrificed, even in a courtroom. * * * * This lawyer was the victim of the pique and hotheadedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd." 336 U. S. 165, 166, 93 L. Ed. 576. The dissents of Justices Murphy and Rutledge objected to the summary nature of the punishment inflicted under these facts.

35 336 U. S. 162, 163, 93 L. Ed. 574.

36 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477.

37 *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, 9 S. Ct. 77 (1888); *In re Savin*, 131 U. S. 267, 33 L. Ed. 150, 9 S. Ct. 699 (1889).

divides contempts into direct and constructive. Direct contempts are those committed in the immediate view and presence of the court (including the use of abusive language by an attorney in irrelevant criticism of a judge or in insolent behavior of an attorney toward a judge, tending to impair the dignity of the court). The procedure for hearing of these contempts is set out in Article 223. Constructive contempts (all contempts other than direct ones) are defined in Article 224, punishable under the procedure set out in Article 225, which requires notice and hearing. It is significant that Mr. Spencer, though committing a direct contempt as defined by the Louisiana codal article, was punished by the more protective procedure for constructive contempt.

2) Those accused of criminal contempt are presumed innocent and cannot be compelled to testify against themselves.[38] Mr. Spencer was afforded these rights.

3) Persons accused of constructive or indirect contempt must be advised of the charges, have a reasonable opportunity to meet them, including assistance of counsel; must have the right to call witnesses and give testimony.[39] Notice is required by Article 225 of the Code of Civil Procedure for a hearing on constructive contempt. The right of counsel and the right to present

[38] *Compare* *Ex parte Black*, *Stone & Ramey Co.*, 221 U.S. 418, 31 L.Ed. 787, 31 S.Ct. 492 (1911).

[39] *Cooke v. United States*, 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925). Louisiana enforces these constitutional safeguards. *See State v. Thompson*, 163 La. 93, 111 So. 611 (La. Sup. Ct. 1927).

evidence is preserved.[40] Again, although this was a direct contempt, the protective procedures of an indirect or constructive contempt were afforded Mr. Spencer.

4) Those accused of criminal contempt are entitled to a public trial before an unbiased judge.[41] These protections were afforded Mr. Spencer. The hearing was not before the judge against whom the vituperation was directed. No complaint is made that the trial judge was biased.

5) *Bloom* itself granted persons accused of serious contempts (those for which a punishment is inflicted in excess of six months at hard labor) a right to trial by jury. The maximum punishment for the first offense of this type of contempt is twenty-four hours imprisonment and a fine of $100; for subsequent contempt before the same court, by imprisonment for not more than ten days and fine of not more than $250.[42]

It is the absence of traditional protection afforded those accused of offenses in certain summary contempt proceedings that seems to prompt Goldfarb, in *The Contempt Power*, to argue for the abolishment of all contempt. Whether

40 In this case, Mr. Spencer chose to represent himself. A 14. The only testimony sought to be produced by Mr. Spencer was that of four judges of the First Judicial District Court. Judge Williams asked the thrust of the testimony and, on being advised, ruled the testimony irrelevant and therefore inadmissible. A 19, 20. Mr. Spencer was again asked if he had anything further, to which he replied, "No, sir. Your Honor, only to make the offer of proof to the effect that I have stated earlier, and since the Court ruled it inadmissable I will rest my case." A 22.

41 *In re Oliver*, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948); *Offutt v. United States*, 348 U. S. 11, 99 L. Ed. 11, 75 S. Ct. 11 (1954).

42 Louisiana Revised Statutes 13:4611.

his argument be valid or not for the instant case is immaterial, as Mr. Spencer was afforded all of the traditional and constitutional rights for one accused of a "petty"[43] offense. Appellant argues:

> "Considering this history, the inherent characteristics of contempt, and the view that 'the contempt power is a potential instrument of oppression' * * * Art. 222(3) must be held to violate the First Amendment on its face."[44]

We are not dealing here with a summary proceeding, the alleged "inherent characteristic of contempt". The exercise of this contempt power is no more "a potential instrument of oppression" than the exercise of any legitimate governmental power. The constitutional vice, if any, must therefore be inherent in control of pleading content, not because the power is expressed in a contempt statute.

Thus narrowed, the issue is: May a state control content of the pleadings filed before its courts, reprobating therefrom abusive and insulting language irrelevantly directed to the trial judge to the impairment of its dignity or respect for its authority? This power is challenged by appellant as violative of First Amendment free speech rights.

Louisiana asserts this right through its narrowly-drawn contempt statute. Many jurisdictions, including Louisiana, also exercise this power through disciplinary rules for attorneys.[45] If the First Amendment prohibits one, it prohibits the other.

43 As the term is used in *Bloom*.

44 Brief of appellant, page 16.

45 See Robert Stern and Eugene Gressman, *Supreme Court Practice*, p. 477 (4th Ed., The Bureau of National Affairs, Inc., 1969); *Lanois v. Home Indemnity Co. of N. Y.*, 204 La. 1044, 16 So. 2d 834 (La. S. Ct., 1944).

Court rules have reprobated abusive pleading content irrelevantly directed to a judge or attorney and have enforced these rules by contempt process.

Canon 1 of the Canons of Professional Ethics of the American Bar Association[46] provided:

> "1. The Duty of the Lawyer to the Courts.
>
> "It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

Canon 1 of the Canons of Ethics of the Louisiana Bar Association is, and was in 1968, identical to the quoted Canon 1 of the American Bar Association. Section 36 of the Ethical Considerations of Canon 7 of the Code of Professional Responsibility of the American Bar Association[47] provides:

> "EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and

46 These Canons were adopted in 1908 and were in force until January 1, 1970, when replaced by the Code of Professional Responsibility of the American Bar Association.

47 Effective January 1, 1970.

> above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration."

Disciplinary Rule 7-106 of the Code of Professional Responsibility of the American Bar Association provides, in part:

> "DR 7-106 Trial Conduct
>
> * * * *
>
> "(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * * *
>
> "(6) Engage in undignified or discourteous conduct which is degrading to a tribunal."

Mr. Spencer, in a motion for recusation, accused the trial judge of being unfit for office by virtue of "corruption, favoritism, oppression and misfeasance in office."[48] For this conduct he was cited for contempt, the rule for contempt alleging that he

> "* * * did file a pleading * * * which contained scandalous, insulting, and abusive language in irrelevant criticism of the judge of said court, * * * and which language, * * * impairs the dignity of the court and the respect for its authority, contrary to the law of the State of Louisiana."[49]

The legislative authority for this contempt is Article 222 of

48 A 8, 9
49 A 10

the Louisiana Code of Civil Procedure, which provides in pertinent part:

"ART. 222. DIRECT CONTEMPT

"A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge. * * *.

"Any of the following acts constitutes a direct contempt of court:

"(1) Contumacious, insolent, or disorderly behavior toward the judge, or an attorney or other officer of the court, tending to interrupt or interfere with the business of the court, or to impair its dignity or respect for its authority;

* * * *

"(3) The use of insulting, abusive, or discourteous language by an attorney or other person in open court, or in a pleading, brief, or other document filed with the court in irrelevant criticism of another attorney or of a judge or officer of the court; * * * *."

Appellant urges the unconstitutionality only of Article 222(3). Involved in this case are both subsections 1 and 3. The citation for contempt against appellant alleged violations of both subsections 1 and 3. If over-breadth of speech limitation is a constitutional vice of Article 222 because it interdicts "contumacious, insolent, * * * behavior toward the judge * * * of the court, * * * to impair its dignity or respect for its authority" and the "use of insulting, abusive or discourteous language by an attorney * * * in a pleading * * * in irrelevant criticism * * * of a judge of the court", compare then the effect of this constitutional vice on the disciplinary rules governing attorneys' conduct. No longer may attorneys be disciplined because

of their failure to maintain "toward the courts a respectful attitude". Nor will discipline lie under the newly adopted disciplinary rule of the Code of Professional Responsibility of the American Bar Association if an attorney "engage in undignified or discourteous conduct which is degrading to a tribunal". The specificity with which the contempt statute of Louisiana is drafted is highlighted by comparison to the Rules of Professional Conduct to which attorneys are subject and for the violation of which they may be disbarred.

Stern and Gressman, in *Supreme Court Practice*, state:

> "It should be superfluous to add that any scandalous matter, any personal attack on opposing counsel or lower court judge, or any imputation of improper conduct by counsel or court has no place whatever in the brief. * * * When such matter appears, a motion to strike all or a portion of the offensive brief becomes appropriate; or the Court may act on its own motion. Indeed, the Court on occasion has imposed disciplinary sanctions on offending counsel, levying fines, suspending them from practice and even issuing orders to show cause why they should not be disbarred."[50]

If this recitation is correct, the action of this Court in those contempt citations fails to meet the constitutional standards urged by appellant.

The opinions of *Re Sawyer*,[51] decided by this court in 1959, contain some of the best discussion of the issues presented by this appeal. Mrs. Sawyer was defense counsel in a widely publicized and highly emotional Smith Act conspiracy trial in Hawaii. During the course of the trial, she made an

50 *Op. cit.* (f. n. 45, *supra*) p. 477.
51 360 U. S. 622, 3 L. Ed. 2d 1473, 79 S. Ct. 1376 (1959).

out-of-court speech, critical of the Smith Act, of conspiracy trials and, so the Supreme Court of Hawaii thought, of the trial judge. For this speech, disciplinary charges were filed. Mrs. Sawyer was suspended from the practice of law for one year. The finding of the Supreme Court of Hawaii was that the speech "impugned the integrity of the judge presiding * * * and thus tended to also create disrespect for the courts of justice and judicial officers generally * * * ". The majority opinion of Justice Brennan, in which Chief Justice Warren, Justice Black, and Justice Douglas joined, limited the issue of review to the narrow question of whether " * * * the facts adduced are capable of supporting the findings that the petitioner's speech impugned Judge Wiig's impartiality * * * ".[52] This majority opinion concluded that Mrs. Sawyer's comments did not in fact, "impugn Judge Wiig's impartiality and fairness". On this limited finding, the decision below was reversed.[53] Justice Stewart concurred in the result, agreeing there was not enough in the record to support the charge of the finding growing out of the speech. Pertinently, Justice Stewart stated:

> "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "Obedience to ethical precepts may require abstention

52 360 U. S. 626, 3 L. Ed. 2d 1478.

53 Justice Black's concurrence in the majority opinion specifically reserved any opinion that Hawaii may have had a law authorizing the suspension of Mrs. Sawyer for her speech; that, if it had such a law, it would be valid; or that she was given the kind of trial she must constitutionally be afforded. 360 U. S. 645, 3 L. Ed. 2d 1488.

from what in other circumstances might be constitutionally protected speech."[54]

Justice Frankfurter wrote a dissenting opinion in which Justices Clark, Harlan, and Whitaker joined. A large part of this dissenting opinion addressed itself to whether or not the pleadings and charges against Mrs. Sawyer alleged action tending to influence or interfere with a pending trial. The opinion suggested that the pleadings were broad enough to encompass interference and that the action of Mrs. Sawyer was clearly calculated to interfere with a pending trial in which she was counsel.[55] Passing, however, from that consideration, this dissenting opinion examined the status of the case assuming the speech could not be considered interference with pending litigation. As to the role of the attorney *vis a vis* free speech in this instance, Justice Frankfurter stated:

> "Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution. An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law: he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded.

54 360 U. S. 646, 647, 3 L. Ed. 2d 1489.

55 This activity, then, might well be reprobated under appellant's view of the limitation of free speech if that speech "interferes" with the administration of justice.

> "Certainly courts are not, and cannot be immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham. 'We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion.' *Re Howell*, 10 NJ 139, 142, 89 A2d 652, 653 (concurring opinion). No matter how narrowly conceived this role may be, it has been betrayed by a lawyer who has engaged in the kind of conduct here found by the Hawaii court. Certainly this Court, the supreme tribunal charged with maintaining the rule of law, should be the last place in which these attacks on the fairness and integrity of a judge and the conduct of a trial should find constitutional sanction."[56]

Thus, as to the right of a state (at that time a territory) to supervise certain conduct of attorneys against a claim of free speech, five (5) justices (the dissents of Justices Frankfurter, Clark, Harlan and Whitaker, and the concurring opinion of Justice Stewart), declared in most unequivocal terms that free speech rights would not permit Mrs. Sawyer to "impugn Judge Wiig's integrity". Four (4) justices did not reach that issue.

Reverting to the instant case, there is no question as to whether or not Mr. Spencer impugned Judge Dixon's integrity: he labeled him "guilty of corruption, favoritism, op-

56 360 U. S. 668, 669, 3 L. Ed. 2d 1500, 1501.

pression and misfeasance in office". The abuse was contained in a pleading filed to that court. The presence or absence of "communication" to the court abused is not at issue.

In 1947, this Court, in *In re Chopak*,[57] had the opportunity to review a constitutional attack on the suspension of an attorney for derogatory remarks made by the attorney to a trial judge. This Court denied certiorari. Chopak felt aggrieved (and, according to the opinion of Circuit Judge Clark, was aggrieved) by a ruling of the federal district judge. He wrote a letter to that judge which was characterized by Circuit Judge Clark in his dissent as "ungentlemanly, if not insulting". In this letter he had described the ruling of the judge as "despotic" and "rule with passion and vehemence". For this letter he was cited for disciplinary proceedings by the district court as having violated Rule 3 of that court. That rule provided in part:

> "Unprofessional conduct on the part of a member of this bar requiring discipline shall include * * * failure to abide by any of the Canons of Ethics of the New York State Bar Association."

The Canons involved were 1 and 3. Canon 1 provided identically to Canon 1 of the Canons of Professional Ethics of the American Bar Association and of the Louisiana Bar Association quoted earlier in this brief.[58] The lower court found his conduct unprofessional and suspended him from practice for three (3) years. The second circuit affirmed; this Court denied certiorari. The dissent of Judge Clark, in the second circuit, directed his divergence from the majority to a possible

57. 66 F. Supp. 265 (DC, ED, NY, 1946), 160 F. 2d 886 (CA2d, 1947), certiorari denied, 331 U. S. 835, 91 L. Ed. 1848, 67 S. Ct. 1516 (1947).
58. 66 F. Supp. 265, see Canon 1, page 24, *supra*.

violation of Chopak's First Amendment free speech rights, relying, as does appellant here, on *Pennekamp v. Florida*[59] and *Bridges v. California*.[60]

It is significant that the punishment in *Chopak* survived a First Amendment attack, although the punishment was for an out-of-court utterance contained in a letter to a judge. Contrasted, Mr. Spencer's attack is contained in a pleading, a public, permanent record. Punishment in *Chopak* was for violation of Canon 1 of the Canons of Professional Ethics commanding a lawyer to "maintain toward the courts a respectful attitude". This is far broader proscription of free speech than that attacked by appellant contained in Article 222 of the Louisiana Code of Civil Procedure. Pertinent, though not controlling, is the fact that apparently Chopak was genuinely aggrieved by the ruling of the district judge,[61] while Spencer had no genuine complaint against Judge Dixon's ruling against him.[62] Chopak's remedy of his real grievance was by appeal. Spencer's remedy of his imagined grievance was the same.[63]

59 328 U. S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946)
60 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941)
61 See dissent of Circuit Judge Clark, 160 F. 2d 887
62 See discussion of merits of Judge Dixon's ruling against Mr. Spencer's client on the merits of the separation action, *infra*, pages 42, 43
63 From the ruling complained of by Mr. Spencer in the separation proceeding of *Hopkins v. Hopkins* an absolute right of appeal lay with the Second Circuit Court of Appeal. Constitution of the State of Louisiana 1921, Article 7, Section 29. In Louisiana, appeal is a matter of right to the intermediate courts of appeal in most civil cases tried by district courts. Additionally, the Louisiana Supreme Court has discretionary certiorari jurisdiction to review all decisions of the courts of appeal. Reviews of any recent edition of the Southern Reporter will reflect that the various courts of appeal of Louisiana are not particularly reluctant to reverse trial judges whom they consider in error. In Louisiana, unlike most common law jurisdictions, appeal in civil cases is of both the facts and law. This is true even though the trial in the court of general jurisdiction may have been by jury. The Louisiana constitution grants no right of jury trial in separation or divorce suits. It is important that though Mr. Spencer felt himself so seriously aggrieved by the trial judge's ruling, he did not bother to appeal it. See minutes of the district court (docket entries), A. 1, 2

At 12 ALR 3d 1408, there is an extensive collection of cases involving disciplinary proceedings against attorneys for improper criticism of courts. The editorial comment relates the universal rule that lawyers may not, in intemperate charges, create disrespect for courts or their decisions. The policy stated is the danger that such attacks tend toward a general discrediting of the courts and weakening of the judicial process. Disciplinary action for these attacks is not, save the comment precluded by guarantees of free speech. We collect in footnote 64 the cases from various state jurisdictions relied on in the annotation. We attempt to include cases closely similar in factual situation to this case. We submit that adoption of appellant's argument requires the overruling of all these cases.[64]

64 The state court citations relied on by the author of that annotation include *In re Phillips*, 109 Cal 471, 18 P 811, and *State Bar Association v. Lewis*, 262 SW2d 321 (Ky. 1953); *In re Finkelstein*, 367 Mich 482, 89 NW 2d 39 (1962), wherein the court noted: "Nor can the respondent be justified on the ground of endangered liberty of speech. When a man enters upon a campaign of vilification he takes his fate into his own hands and must expect to be held to answer for the abuse of the privilege extended to him by the Constitution. 'An attorney of more than twenty years' standing at the bar must be presumed to know the difference between respectful fair and candid criticism and scandalous abuse of the courts which gave him the high privilege not as a matter of right to be heard at the altar of justice.' *State Bar Comm. ex rel. Williams v. Sullivan*, 16 Okla 249, 181 P 703 (1919); *Re Sims*, 41 Wash 2d 270, 111 A 2d 1 (1952); *Gregory v. National Bank of Detroit*, 313 Mich 27, 20 NW 2d 865 (1945); *Williams v. Eastman*, 83 Ariz 81, 316 P2d 868 (1957); *Bar Association of San Francisco v. Phillips*, 39 Cal App 466, 179 P 580 (1919); *People ex rel. State Bar of California*, 219 Cal 218, 26 P2d 19 (1933); *People ex rel. Skelton v. Brown*, 17 Cal 2d 451, 110 P 818 (1941); *State ex rel. Keet v. Maxwell*, 19 Ala 51 (1851); *Petition of Chicago Bar Association*, 355 Ill 361, 189 NE 444 (1934); *People ex rel. Chicago Bar Assn. v. Sherman*, 364 Ill 340, 4 NE 2d 472 (1936); *Re Wilson*, 13 Ill 2d 91, 240 NE 2d 203 (1968); *In re Smith*, 20 Ind 47 (1863); *Re Hull*, 99 Kan 21, 160 P 1141 (1916); *Bar Comm. v. Nelson*, 261 Mich 240, 246 NW 110 (1933); *Re Foley*, 166 Mich 211, 131 NW 1101, certiorari denied, 361 U S 879, 4 L Ed 2d 71, 80 S Ct 144 (1959); *Re Hinz*, 367 Mich 222, 211 NW 2d 210 (1962), certiorari denied, 376 U S 972, 11 L Ed 2d 616, 84 S Ct 1461; *Re Hinz*, 84 Nev 408, 174 NW 150, (1968); *Nebraska State Bar Assn. v. Krecek*, 177 Neb 660, 131 NW 2d 118 (1964); *Re Gilmartin*, 107 NJ L 1, 151 A 9, 660 (1930); *Re*

Appellant candidly admits that the constitutional construction urged by him would extend beyond application of the "clear and present danger" criterion now prevailing for outdoor speech and press limitations.[3] Appellant also urges that this Court adopt as a constitutional standard the requirement that prohibited language must constitute an "actual solicitation".

We urge that it is neither appropriate nor indicated by prior Court expressions that a "clear and present danger" or "actual solicitation" standard be enunciated for the first time in this Court concerning control of conduct made by counsel in open court or in pleadings. The danger of creating a dichotomy of literary form concerning protected free speech has

been discussed several times by Justice Frankfurter.[57] He pointed out that "clear and present danger" was a literary term of Justice Holmes, never used to express a technical legal doctrine or convey a formula for adjudicating cases.

> "In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution."[58]

Whether or not "clear and present danger" has now become a legal doctrine, as feared by Justice Frankfurter, does not control this case. It has never been utilized to characterize the limitation of a court to control its proceedings. There is a danger, as expressed by Justice Frankfurter, that these literary phrases are made to do service for critical analysis by turning them into dogma. Stated differently, Justice Holmes, in his dissenting opinion in *Hyde v. United States*, said:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[59]

It would be an equal mistake although not one that would compel the decision in this case urged by appellant if this Court made the term "actual obstruction" a constitutional standard concerning this subject.

[57] See concurring opinion *Pennekamp v. Florida*, 328 U. S. 331, 354, 66 S. Ct. 1029, 1036, 1037, 90 L. Ed. 1295 (1946); dissenting opinion *Bridges v. California*, 314 U. S. 252, 282, 62 S. Ct. 190, 205, 86 L. Ed. 192 (1941).

[58] 328 U. S. at 347, 66 S. Ct. at 1036.

[59] 225 U. S. 347, 391, 32 S. Ct. 793, 798, 56 L. Ed. 1114 (1912).

John Adams wrote of the first Constitution of Massachusetts:

> "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, and impartial and independent as the lot of humanity will admit."[70]

Free speech is one of our most noble and sacred rights. It has for its protection and preservation only an effective judicial system. If that judicial system can no longer exercise its constitutional mandate in an atmosphere of dignity and order, free speech, as every other freedom we cherish, cannot survive. The observation of Justice Frankfurter in his dissent[71] in *Sawyer* eloquently speaks to this issue:

> "The problem raised by this case — is the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law? — cannot be disposed of by general observations about freedom of speech. Of course, the free play of the human mind is an indispensable prerequisite of a free society. And freedom of thought is meaningless without freedom of expression. But the two great Justices to whom we mostly owe the shaping of the constitutional protection of freedom of speech, Mr. Justice Holmes and Mr. Justice Brandeis, did not erect freedom of speech into a dogma of absolute validity nor enforce it to doctrinaire limits. Time, place and circumstances determine the constitutional protection of utterance. The First Amendment and the Fourteenth Amendment, insofar as it protects freedom

70 Article XXIX of the Declaration of Rights of the Constitution of Massachusetts, 1780.

71 Although a dissenting opinion, the views expressed as to this issue were joined by a majority of the court, four justices not reaching the issue.

> of speech, are no exception to the law of life enunciated by Ecclesiastes: 'For everything there is a season, and a time for every purpose under heaven.' And one of the instances specifically enumerated by the Preacher controls our situation: '[A] time to keep silence, and a time to speak.' Eccles. 3:1, 7. Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer."[22]

Does Louisiana have a genuine interest in preserving the authority, power and dignity of its courts? Is the questioned statute calculated to achieve this end within constitutional limitations? We submit both questions require an affirmative answer. Institutions are not justified by their forms. This is no less true for courts. Justice, and respect for that justice, will not result solely because judicial proceedings are decorous. Respect for courts of justice is earned only by the quality of justice meted out by courts and the quality of the laws interpreted by courts. It is equally true that if courts are unable to control the decorum and orderly process of proceedings before them, particularly by the officers of the courts, attorneys, they will neither obtain nor deserve the respect which they must have if our liberties endure. Forms of institutions do relate directly to the effectiveness of the institutions. We deal here with a narrow issue of respect pleading content by attorneys. If courts become powerless to punish abuse in pleadings of the type here made, they will be equally powerless, in the broader context, to control their

[22] 360 U. S. 622, 666, 4 L. Ed. 2d 1471, 1499, 79 S. Ct. 1376

proceedings. All proceedings before a court are, after all, only speech. Any court rule, any disciplinary rule, or any legislatively enacted procedure, of necessity deals with speech.

In a true sense, irrelevant criticism of another attorney or a judge or insulting, abusive or discourteous language in court or in pleading is necessarily disruptive of the judicial process. Such conduct, if not promptly punished (with all constitutional safeguards), inevitably impairs the dignity and respect for judicial authority. In an age when the right of free expression is being endangered by mob interruption, when orderly judicial process is being impaired by disorders, the preservation of a system of justice compels that courts be vigilant of the conduct of their proceedings.

We assume that Mr. Spencer's reliance on *Holt v. Virginia* is misplaced. The constitutional issue of free speech was never considered by this Court in *Holt*. The case holds only that a litigant has a constitutional right to a fair trial before an impartial tribunal and that corollary to this right is the right to file motions raising necessary issues (either for recusation of the judge or venue) for protection of this right. This Court did not intimate that the right to file such a motion included a right to deliberately abuse the judge by including language directed to him which was insulting, abusive, or discourteous. The Code of Practice, Articles 221 *et seq.*, in fact, instead of being in conflict with *Holt*, by specific language excludes the possibility of contempt for the exercise of the right granted in that Article 222 interdicts only "irrelevant"

(1965)

abuse. This Court in *Holt* held that the allegations of the pleadings were " * * * no way offensive in themselves, but wholly appropriate to charge bias * * * ". If language is "wholly appropriate", it cannot be "irrelevant" to the pleading and thus contemptuous under Article 222.[74] In this case the language "corruption, misfeasance and favoritism" added not one scintilla to the motion to recuse. Its inclusion was an obvious attempt to embarrass the trial judge against whom counsel held animosity.[74]

Appellant argues that the language contained in his motion cannot be abusive or inappropriate because it is "lawyer-like" and simply tracks statutory (constitutional) provisions concerning removal of judges. The fact that a pleading may track a statute does not detract from the abusiveness of that pleading nor add to its relevance. It would be as abusive and as much of a threat to the dignity and authority of a court to file a pleading accusing a trial judge of "murder, rape, burglary, robbery" or any other crime. These words may be "lawyer-like" when used for their appropriate purpose. They are not "lawyer-like" when contained in a pleading in litigation pending before that judge. If a judge be guilty of any of such offenses, or the offenses alleged by appellant, he should be removed from office. Our ethics establish a duty in that regard. This duty does not give an attorney license to make these charges irrelevantly in a pleading.

Louisiana is a fact-pleading state. It does not recognize issue or notice pleading.[75] The charges made by Mr. Spencer

[74] See excerpt from stricken pleading of Mr. Spencer in the earlier federal court part of this proceeding quoted on page 534 of 290 F. Supp.

[75] Louisiana Code of Civil Procedure Article 854. See comments to this article of Louisiana Law Institute published in West La. C.C.P., Vol. 1.

were conclusions, not charges of fact having relevance to the case. Mr. Spencer at no time alleged that the judge was aware of his client's opinion of the judge. He did not allege either what facts constituted the "corruption, favoritism, oppression and misfeasance in office" or any connection of these offenses with the pending litigation. Judged by any pleading standard, but certainly by the standard of fact-pleading, the words were not appropriate to the charge of "interest" in the pending litigation.

III

DUE PROCESS OF APPELLANT'S CONVICTION

Appellant urges[76] that his conviction violated his due process rights because it is unsupported by any evidence. This issue, not dealing with the constitutionality of a state statute,[77] should not be reviewable by appeal under 28 U. S. C. §1257(2). We urge that certiorari should not be granted on this issue.

The citation for contempt alleges that Mr. Spencer, as counsel, filed a pleading containing irrelevant language directed to a trial judge which was scandalous, insulting and abusive, which impaired the dignity of the court and the respect for its authority, contrary to the law of Louisiana.[78] At issue, then, is only: (1) whether or not the pleading was filed by Mr. Spencer, as attorney, containing the language and; (2) was the language, in fact, scandalous, insulting and abusive, in irrelevant criticism of the judge or impairing the dignity of the court and the respect for its authority? Mr. Spencer's authorship of the pleading is admitted.[79]

The constitutional argument is that there was "no evidence"[80] upon which to base the conviction. The pleading containing the allegation, and the record of *Hopkins v. Hopkins* constituted the evidence. The conclusion that the language of

76 Brief of appellant, pages 30-32.

77 On page 32 of appellant's brief, he assumes for the purpose of his argument II the constitutional validity of Article 222 of the Louisiana Code of Civil Procedure.

78 A. 10.

79 A. 18. "THE COURT: I note that you do not disclaim the actual filing which is under yous signature?
MR. SPENCER: No, sir, I concede that."

80 Brief of appellant, page 30.

the pleading violated the statute is a conclusion of the "sufficiency of the evidence", which should not be the subject of constitutional review here. Even so, we submit Judge Williams was perfectly justified, factually, legally and constitutionally in his conclusion.

In order to consider this matter in its correct perspective, the whole circumstance of this contempt citation needs to be considered. This contempt citation issued out of *Hopkins v. Hopkins*, a separation[81] filed in the First Judicial District Court of Louisiana, a court of general jurisdiction. Mr. Spencer represented the plaintiff. As grounds for separation it was alleged that Mrs. Hopkins abandoned Mr. Hopkins.[82] For abandonment to be grounds for separation, two elements must concur: (a) the offending spouse must have withdrawn from the common dwelling without a lawful cause, and (b) the offending spouse must have refused to return.[83] This cause was heard on confirmation of default[84] on March 20, 1968. Testimony was adduced from two witnesses, Louis P. Hopkins, the plaintiff, and his corroborating witness, Mr. Charles Anderson.[85] Mr. Hopkins' testimony was that he and his wife separated as a result of a mutual agreement;[86] that his wife had subsequently refused to return. The corroborating witness, Mr. Anderson, testified that he knew the parties were separated

81 In some instances a judgment of separation in Louisiana is a prerequisite to a divorce. Louisiana Revised Civil Code Article 139

82 A. 3, 4.

83 Louisiana Revised Civil Code; Articles 138(5) and 143

84 The appropriate proceeding for proof of a claim in which no appearance is made by defendant. Louisiana Code of Civil Procedure, Article 1702

85 A. 5-7.

86 A. 6

and that Mrs. Hopkins refused to return.[87] On this evidence only, the matter was submitted. Judge Dixon ruled that the plaintiff had failed to prove his case, stating:

> "The suit is based on abandonment. The testimony of the plaintiff was that he and his wife had an argument and they decided that either he leave or she leave, so he left. That is not an abandonment. The demands of the plaintiff are rejected."[88]

As properly interpreted by the Louisiana Appellate Courts, a separation by agreement is not a withdrawal from the common dwelling without cause, and therefore not an abandonment within the meaning of Revised Civil Code Article 143.[89]

Louisiana grants to litigants who consider themselves aggrieved by lower courts an absolute right of appeal in cases of this nature.[90] Examination of the docket entries (minutes) of *Hopkins v. Hopkins* in this record[91] reveal that no appeal was taken by Mr. Hopkins. The next day, March 21, the motion to recuse giving rise to this contempt was filed by Mr. Spencer.[92] The motion to recuse alleged, in Article 3, that Judge Dixon, "despite overwhelming evidence of the abandonment of petitioner by defendant * * * dismissed plaintiff's suit giving as his oral reason thereof that the plaintiff had not proven a case of abandonment * * *." The motion then, in Article 4, alleged the "corruption, favoritism, oppression and misfeasance in office" of Judge Dixon.

87 A 7
88 A 7
89 *Jardes v. Jardes*, 191 So. 2d 648 (La. 2nd Cir. Ct. of App., 1966); *Scorsine v. Scorsine*, 188 So. 2d 224 (La. 4th Cir. Ct. of App., 1966)
90 Constitution of the State of Louisiana, 1921, Article 7, Section 29
91 A 1, 2
92 A 1

At the hearing for reparation on March 29, there was no colloquy between counsel and judge. Counsel was not prejudiced from introducing any evidence or making any argument. The facts proved simply did not warrant the relief sought. We urge a comparison of these proceedings with the proceedings reported in *Matter of Peters*, 16 Ill. 2d 179. In *Peters* this Court sustained a contempt conviction of an attorney for his remarks to a trial judge despite very strong provocation of the trial judge. We ask also that these proceedings be compared with *In re Hopp*, 29 Ill. 2d 104. According to Judge Craft of the Second Circuit, Hopp was genuinely aggrieved by the actions of the trial judge, almost which he subsequently complained. The Second Circuit affirmed disciplinary proceedings against Hopp. This Court dismissed review. Hopp's remarks were contained in correspondence. Mr. Spencer's remarks are a part of the permanent record of a judicial proceeding.

While these cases should not be controlling, they are presented to consider the circumstances prompting Mr. Spencer's outspoken attack. This Court in *Hopp* cautioned to prevent that the relief for the wrong done him would be aggravated rather than be grounds for his regret at having had the gall to attack the judge doing wrong to him.

A trial judge in allowing attorneys latitude in the range of conduct for which they are sought to stay proceedings is that it encourages other aggrieved litigants to the judicial process to engage in

whatever conduct they may ultimately think proper to discipline that unethical proceeding. We are not without power to correct such disruptions of this type. If attorneys cannot be expected to conduct themselves orderly before courts, we have no right to expect any orderly conduct by any persons. Every commercial litigator has at least one disappointed litigant at the termination of his case which has attracted bilateral sanctions of appeal for those litigants. When that appeal is unavailable, it is difficult to understand the necessity appellant claims exists for the keeping of status provided by Article 922.

Appellant seeks in this Court a denial of appellee's motion that the designations appeals were not his own but were without those of his client. He states that his client was attempting to treat Judge Wiese's removal from office because of that order's entrance by means of corruption. Appellant appears confused and misdirected. His denial of appellee's designations is without merit. The only designations subject to the power of this Court are those designations pleading errors by the trial court in the proceedings before the United States District Court in the original suit of these proceedings. We cannot likewise withdraw the denial of appellee.

Appellant claims that all matters were resolved by the settlement agreement of this case although facts contradicting pursuant to the settlement agreement. This is unsupported by the record. We have already found that appellant's counsel was not authorized to enter into the settlement agreement. We cannot find that the [illegible]

If Mr. Spencer's client had been attempting to remove Judge Dixon from office for any reason, and if Judge Dixon had been aware of such a movement, we still submit that there is no justification for an attorney, who owes a duty of respect and decorum to the courts before which he practices, to include in any pleading the allegation that the judge is corrupt. The repetition of the alleged charge added nothing to the motion to recuse. If a judge is corrupt, if a judge is incompetent, if he is guilty of incompetence, if he exhibits temperament or is guilty of gross misconduct, he should be removed from office, and it is the duty of the bar to take appropriate action that this occur.[10] There is a proper forum for this action. At the time of questions, preceding the oath of counsel were administered, requiring the signature of each lawyer to a citizens' letter which the attorney general was compelled to institute removal proceedings. It was simple and necessary to remind counsel that the abusive language of Mr. Spencer be contained in the motion for recusation.

CONCLUSION

For these reasons we urge: a) that this court lacks jurisdiction; or b) alternatively, that the judgment below be affirmed.

Respectfully submitted,

JACK P. F. GREMILLION
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State of Louisiana

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Shreveport, Louisiana 71101

Signed: Neil Dixon

Neil Dixon

Attorneys for R. B. Williams,
Respondent Judge

APPENDIX "A"

IN THE SUPREME COURT OF
THE STATE OF LOUISIANA

LEWIS P. HOPKINS, JR.
V.
DIANA McCINTY HOPKINS

No. 19,953

Notice of Appeal to the Supreme Court of
the United States

Notice is hereby given that DIANA SPENCER, the appellant herein, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of Louisiana denying a Writ of Certiorari thereby affirming the judgment of the First Judicial District Court sustaining the validity of Louisiana Code of Civil Procedure Article 3941 which decision of the Supreme Court of Louisiana was rendered on June 26, 1967. This appeal is allowed under the rules of the Louisiana Supreme Court from a refusal of the court to grant writs pursuant to its supervisory jurisdiction. An appeal lies from a contempt conviction in a federal court to the Supreme Court of the United States

APPENDIX "A" (Continued)

This appeal is taken pursuant to 28 U. S. Code, Sec

The Clerk of the Supreme Court of Louisiana will
prepare a transcript of the record in this cause for
consideration by the Court of the United States Supreme Court
and include in said transcript the following:

The entire record in the Supreme Court of Lou
in the case of LEWIS P. HOPKINS, III v. DIANA
MOONEY SPENCER, Number 59425.

The following questions are presented by this appeal:
Whether Louisiana Code of Civil Procedure,
Article 222 and particularly Subsection 3 thereof is invalid
as violative of the Fourteenth Amendment to the Constitu
of the United States and through it, the First Amendment
to the Constitution of the United States, upon the grounds that
it denies the appellant freedom of speech and further that it
denies to appellant due process of law.

Whether there was any evidence that appellant
violated the provisions of Article 222 of Louisiana Code

DIANA SPENCER

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(Certificate omitted)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 513

IN THE MATTER OF DAN A. SPENCER

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

APPELLANT'S SUPPLEMENTAL BRIEF

MELVIN L. WULF
ELEANOR HOLMES NORTON
American Civil Liberties Union Foundation
156 Fifth Avenue
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Attorneys for Appellant

the witnesses were called I would not permit their testimony to be entered into the record. *The only matters that may be entered into are, first, your response to the rule—in which there is no attempt on your part to say you didn't sign it or that you weren't there or something of that sort—and, second, no attempt on your part to disavow the instrument in some part or other.* Those two matters you more or less indicated to the Court your position on. I am not attempting to have you commit yourself because what you have stated to the Court is the truth, exactly what you have done. Now it becomes this Court's duty to advise you as to what my attitude is or what my decision is towards the filings made by an attorney. You are in a different category than say the witnesses or the laymen. Now, to this ruling you have the privilege, of course, of taking whatever exception you have— (emphasis added).'

The court repeated its ruling that the only question to be decided was whether appellant filed the motion to recuse (A. 21-22):

The Court: I thank you, Mr. Spencer. Did you wish to take exception or make any exception? I don't think it is necessary, but I don't want to cut you off in any way and have someone say that you did not take an exception.

The Court has made its ruling. Do you understand it? I will reiterate it so that you will understand it. The Court rules that, and I understand from what you have told me that you have subpoenaed certain witnesses and the thrust of what you expect to prove from

those witnesses, *and that in neither instance was it a plea, as I interpret it, of a disavowal of the filing of the document, that you didn't do it, that someone else did it.* Now, those are the two points that the Court feels would be a proper area for the Court to check into.

Now, if you have nothing else, the Court rules that the testimony of the subpoenaed witnesses, who, as I understand from you, are the District Court Judges of the First Judicial District Court, comprising—is it four men? (Emphasis added.)

The court having made it abundantly clear what the issues were, it would have been futile for appellant to persist in asserting his right to pursue other matters. Involved then and there in one contempt proceeding, it is perfectly understandable that he would go out of his way to avoid another, which is itself a concrete example of the debilitating effect that arbitrary contempt charges have upon a lawyer's conduct in court.

Under these circumstances, the Court should, at minimum, vacate the judgments below and direct the state courts to entertain further evidence to clarify the record.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

MELVIN L. WULF

May 26, 1970.